Supreme Court, U.S.
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No. 96-1275

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

THE STATE OF CALIFORNIA,

Petitioner,

v.

KWASI OPUKU-BOATENG,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth of Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, under the religious accommodation provisions of Title VII, 42 U.S.C. § 2000e(j), a state employer must, at a minimum, provide a prospective employee with equal opportunity to utilize scheduling, shift trade, and transfer opportunities for religious accommodation as are generally available to its employees.

2. Whether an employer claiming undue hardship is required to prove accommodation is not possible by demonstrating both the magnitude and the fact of the hardship.

3. Whether the petitioner can now for the first time raise the Establishment Clause and Tenth Amendment issues when it failed to raise or preserve either before the district court or the court of appeals.

4. Whether, if it is permissible for the petitioner to raise the constitutional issues before this Court, the Ninth Circuit's decision affording respondent the same equal opportunity to utilize scheduling, shift trade, and transfer opportunities for religious accommodation as are generally available to other employees violates either the Establishment Clause or the Tenth Amendment.

PARTIES TO THE PROCEEDINGS

Petitioner, who was a defendant below, is the State of California. Other individual State officials who were originally named as defendants were dismissed as parties in the district court.

Respondent, who was the plaintiff below, is Kwasi Opuku-Boateng, an individual.

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STATEMENT OF THE CASE

Introduction

In its Petition for Writ of Certiorari, the State of California presents facts in a distorted and incomplete manner. In some instances, it takes great license in summarizing testimony while omitting facts unfavorable to its interests.

Respondent generally adopts the factual statements included in the court of appeals opinion under the heading "Background." App. at 3-9.[1] To a large extent, the Ninth Circuit's recitation of the facts reiterates the trial court's findings of fact, App. at 34-39, with one notable exception -- the claimed outcome of a poll, App. at 38. The court of appeals determined that poll to be fatally flawed, App. at 20, and found, to the extent the district court relied on the results of the poll, it was reversible error. App. at 22. Nevertheless, petitioner's statement of facts continues to improperly include the claimed results of the poll as one of its linchpin factual claims. Pet. at 8.

Because respondent did not attempt to use involuntary trades as a method of accommodation, petitioner's factual representations concerning the claimed work schedule preferences are irrelevant. What is relevant is how use of the scheduling process already in place, coupled with voluntary trades at this entry level employment position, together with normal subsequent transfers, if permitted by petitioner, could

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[1]References appearing herein are as follows: "App. at __" refers to the Appendix to the Petition; "App __ *infra* at __a" refers to the Appendix to this Brief; "RT __" refers to the Reporter's Transcript on Appeal; "Pl. Ex. __" refers to plaintiff's trial exhibit; "Pet. at __" refers to the Petition for Writ of Certiorari.

have resulted in a reasonable accommodation.

Statement of Facts

On October 18, 1982, Opuku-Boateng was awarded the position of plant quarantine inspector at the Border Inspection Station in Yermo, California, to begin working November 2. That station employed a total of 15 permanent inspectors,[2] including 5 supervisors. It operated 7 days a week, 24 hours a day, and maintained 3 eight-hour shifts: day, evening, and night. The size of the staff and number of shifts increased during certain times of the year, such as summer. App. at 4.

As the trial court found, employees were required to work "an equal number of undesirable weekend, holiday, and night shifts." Policy required employees be assigned varying schedules to avoid the possibility of collusion between inspectors and truckers and to expose inspectors to the myriad commodities being transported. App. at 5.[3]

Upon being selected for the permanent position, Opuku-Boateng terminated his temporary employment at another location with the Department and moved his family to Yermo.

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[2]Often temporary inspectors were used to supplement the work force when needed. App. A *infra* at 15a-16a; RT 500.

[3]Although petitioner refers to the scheduling arrangement as a "rotating shift," Pet. at 2, it was not the normal "rotating" shift within which an employee would be scheduled according to sequential rotation. The shift assignment depended on the discretion of the scheduler. *See* App. A *infra* at 16a-19a. In fact, the schedule was established so it would be non-predictive to avoid collusion. RT 864-65. The actual work schedules at smaller inspection stations, such as Meyers and Topaz, did not follow a rotational schedule. Pl. Ex. 25. Plant inspectors were allowed to voluntarily trade or swap shifts among themselves. RT 400-01, 937.

On October 28 he visited the station where he reviewed the work schedule learning he was scheduled to work Saturday, November 14. He informed the acting supervisor, William Whitacre, that his religious beliefs precluded him from working on his Sabbath. App. at 5. Whitacre became angry, telephoned his supervisor Charles Gray, saying "there is a guy here who says he cannot work Friday, he cannot work Saturday, he cannot work Sunday, and we don't need him here." RT 111-12.

Whitacre advised Opuku-Boateng unless he agreed to work Saturday his appointment would not be processed. Respondent telephoned Gray to inform him of the problem. App. at 5. Contrary to Whitacre's assertion, respondent advised Gray he was not requesting all three days off. He also said he was willing to take night positions and work every Sunday or do anything else to work out an accommodation. RT 124. Respondent also noted that since there were three shifts on Friday, he could work at least one, and possibly two, as well as one of Saturday's shifts. RT 214-16.

Gray told Opuku-Boateng another employee wanted Sundays off, and respondent indicated he would work Sundays if that employee would work Saturdays. RT 221-23. Gray said to agree to that would be demoralizing to others. RT 113-15. Gray advised respondent the Department could not accommodate him but then said he could not make that decision without speaking with his superiors. RT 115-16.

Gray spoke with the program supervisor, Howard Ingham, about Opuku-Boateng. RT 907. Ingham testified he instructed Gray not to complete respondent's appointment but said he was "going to clear [it] through Personnel to make sure [he was] on solid ground." RT 975. Ingham then contacted personnel indicating he did not feel the Department should

continue with respondent's appointment. RT 976.

On November 1, Ingham wrote Opuku-Boateng saying his request for accommodation had been reviewed and if he wanted to work as a plant inspector, he would be expected to work assigned shifts as scheduled. App. at 7-8. On November 3 respondent's attorney filed a complaint on his behalf with the State Personnel Board claiming violations of state and federal law. App. at 8. On November 8 Ingham informed respondent the appointment would not be made since he could not be "available to work frequently from Friday sundown through Saturday." *Id.*

DISPUTED STATEMENT OF FACTS

Factual exaggerations and inaccuracies pervade petitioner's statement of facts:

(1) Petitioner states that "[w]hile one or two employees were willing to make occasional trades, none were [sic] willing to trade with the respondent on a regular or permanent basis." Pet. at 8; *also see* p. 12. In overstating the facts, petitioner refers to RT 444-47, but fails to accurately state that testimony. Maria Lozano, one of the supervising employees, testified: "I would be willing to trade with him sometimes but not all the time." RT 444. However, she also testified she assumed other employees would be willing to swap with respondent. *Id.* at 445. Lozano was concerned about any *permanent requirement* imposed by the Department that she swap, particularly when she had been told that respondent was requesting three entire days off each week. *Id.*[4]

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[4]Petitioner failed to include the testimony of Delbert Lee, an inspector at Yermo and one of the State's witnesses. At the trial the State never even asked Lee whether he would have been willing to trade. However,

(2) Petitioner contends the evidence showed most employees preferred not to work *Saturdays* because they wanted to be with their families. Petitioner fails to reveal the testimony was for *both Saturday and Sunday*. Lozano testified Sunday was equal to or an even more undesirable work day. Lozano testified some, but not all, preferred to be off weekends. *Id.* at 442. "But not everyone that works at the Yermo station... have the same priorities" concerning days off, she said. *Id.* at 476. She acknowledged that while attending school, she did not prefer to have Saturdays off. *Id.* Petitioner also cited William Whitacre. But he testified a successful Saturday swap depends upon the employee with whom you request a trade. *Id.* at 501. The only other testimony cited by petitioner was that of Ingham who testified only that "employees want[ed] as many weekends off as possible." *Id.* at 1012.

(3) Petitioner stated that "getting another inspector to give up a weekday shift for a Saturday was very *unlikely*." Pet. at 11 (emphasis supplied). The only support for this statement was from Fred Sandridge who testified it was *easier* to trade a weekday than a weekend. *Id.* at 633. Sandridge testified employees "like their day shifts on Saturday, and very seldom -- again, would trade into evening shifts and 4:00 to midnight and graveyards only if they were going to school." *Id.* at 640. Sandridge testified Sunday was an even heavier workday than Saturday, the heaviest they had. *Id.* at 634. Lozano agreed that a person who does not want to work on Saturday would have less success swapping with an employee who has to work on a Tuesday because it would break up his/her days off. *Id.*

Lee testified he and other employees engaged in shift swapping to obtain time off for "personal pleasure." RT 887. He said there never was a time when he was unable to get off from work. *Id.* He testified he knew of no preference among employees at Yermo concerning days to be swapped and he had no preference.

at 438-39. Elisa Martinez testified it depended upon the employee with whom one attempted to swap whether it would be more difficult to be off on a Saturday. RT 501.

(4) Petitioner acknowledged that a likely trade was a Saturday shift for a Sunday one. But contended the pool of people with whom one might make such a Saturday-Sunday trade was generally limited to only two other inspectors. Pet. at 11. The testimony, however, shows the pool would also include additional inspectors who were off duty, thus increasing the available pool. *Id.* at 637. In addition, there were six- and nine-month seasonal employees as well as "time worked" employees who were available for assignments when needed. App. A *infra* at 15a-16a; RT 500, 509.

Gray told Opuku-Boateng there was an inspector who wanted to be off on Sunday for religious reasons. RT 221-23. But apparently no consideration was given to such reciprocal trades for religious reasons. Martina Haleamau, branch chief at the Department who testified for the State, had the overall responsibility for five major programs, including quarantine enforcement. She testified that such trades would make accommodations easier. *Id.* at 1175.

(5) Petitioner flatly states that "[e]mployees also keep track of the shifts they work, and would complain if they perceived an unfair allocation of weekend and weekday shifts." Pet. at 8. But the testimony shows that if some employees did this, others did not. RT at 501, 578, 886.

Petitioner's statement is also misleading. Although petitioner cites the testimony of Ingham to support its position about scheduling complaints, when Ingham was asked to provide an idea of some of the complaints he had received about scheduling, he focused not on Saturday or weekend scheduling

concerns, but rather on graveyard and holiday shifts. He testified:

> Primarily it was the assignment of too many graveyards, too many -- "I'm getting assigned more graveyards" or "I'm being assigned more swings" or "I'm not getting holidays that the others are getting," and it was why we were almost paranoid to the point of trying to be equal to all employees.

RT 958. Although petitioner cites Fred Sandridge, he, like Ingham, confirms the complaints did not relate to weekend scheduling, but rather graveyard shifts. *Id.* at 608. It is clear from the record that the Yermo employees' greater concern was assignment to graveyard shifts and holidays. Of course, Opuku-Boateng's offer to work the graveyard and night shifts and holidays would have provided the Department with an opportunity to reduce such complaints while accommodating respondent's religious needs.

(6) Petitioner contends there were four criteria used in scheduling, Pet. at 8-9. The State attempts to conjoin a mishmash of testimony taking snippets of testimony and discarding others not in its interest. It then announces a four-part "criteria" which no witness ever said were the four main criteria used by schedule-makers.[5] Sandridge testified about making out a monthly schedule:

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[5]This argument seems to stem from petitioner's trial strategy where the State attempted to introduce evidence about the impact of accommodation claiming to use the actual 1982 Yermo schedules. However, trial examination showed this to be a sham, and the schedule had been fictionalized to produce what the State finally admitted to the court was its "goals" rather than actual practice. App. E *infra* at 51a-57a and App. F *infra* at 62a-67a.

> The practice every month in making out the schedule was to be sure that the days off are posted first and everybody got the special days that they requested such as birthdays, anniversaries, and any other type of special, one-period-of-time request, and then next was to fill in the various shifts that were worked.

Id. at 600. *See also* Maria Lozano's testimony confirming that the scheduling process permitted all employees to request shifts off prior to the posting of the schedule. App. A *infra* at 4a-5a, 10a, 19a-20a.

Sandridge was asked by the court whether in scheduling "each person would work the same number of shift number 1 on the same day, so that, if possible, every person would work the same number of shift number 1 on Thursday as everybody else and shift number 2 on any other day -- or any day, Saturday, the same as everybody else so that everybody ends up working during the month the same number of each shift and the same number of each shift per day?" Sandridge responded:

> Not quite that extent. What it was, was for a 12-month period you would try to equalize the number of shifts worked over a 12-month period, but the days didn't intervene in it at all. We didn't try to consider whether it was a Saturday or Sunday, we just considered the total number of each shift.

Id. at 603-04. Sandridge also stated the Department only attempted to equalize the number of shifts posted by the schedule-maker. He stated that "because of the number of changes as happen immediately when you post [the schedule] . . . you only count the assigned shifts. You do not count the shifts that they trade into." *Id.* at 609.

Martina Haleamau, cited by petitioner about the scheduling criteria, Pet. at 8, testified only that it was necessary

> to make sure that [the schedule] is equalized and they're meeting the criteria, 40 hours a week, that employees are adequately -- the days, swings, and graveyard shifts are covered and that no one employee is given favoritism with regard to all days or all swings or all graveyards, and to make sure that the employees all had equal time off, *whether it was during the workweek or on the weekends*.

Id. at 1105-06 (emphasis supplied). Haleamau also testified that "[o]ne of the criteria is to try to give them a *weekend off a month*. We try also to give them *more than two days* off if we can because it helps them." *Id.* at 1139-40 (emphasis supplied). The record proves the Department did not follow any pattern for the scheduling of employees, and its claim to a four-part criteria is pure fiction. *See* App. A *infra* at 5a-6a, 17a-21a; App. B *infra* at 22a-26a; App. D *infra* at 45a-50a; App. F *infra* at 62a-67a. In fact, Ingham admitted the so-called rotation requirements were not official Department policy, but rather his concept of "fairness" and an attempt to "eliminate complaints." App. D at 36a.

(7) Petitioner states "[s]cheduling an inspector, like respondent, to have a fixed twenty-four hour period off every week at such a small station would be virtually impossible." Pet. at 10-11. Nothing cited by the petitioner, however, supports the statement that it would be "virtually impossible" to provide an accommodation at a smaller station, even on a temporary basis.

William Whitacre testified there is *less flexibility* for providing an accommodation at a smaller station. But

Sandridge's, RT 641-42, and Haleamau's, RT 1017-18, testimonies have nothing to do with the ability to accommodate at small stations. In fact, Renee Finney, an Adventist like respondent, was accommodated for three months in the summer of 1980 at Topaz, a small station, and in 1982 at Meyers, another small station, without once being scheduled or required to work during her Sabbath. RT 695-96, 702-04. In order to accomplish this, Finney worked more Sundays than other employees. *Id.* at 705. This arrangement was logical since there was another employee who wanted to attend church on Sunday. *Id.* All this was accomplished through scheduling, and Finney was never even required to trade with another employee. *Id.*[6]

(8) Petitioner states that "inspectors often could not find others with whom to trade, even when they had compelling reasons for the swap like a family emergency." Pet. at 12. For example, petitioner cites Delbert Lee. However, Lee testified there were never occasions when he was unable to swap. *Id.* at 887. Lozano recalled only one event in 1979 when she was unable to swap. *Id.* at 434-35. Martinez testified there were instances when she tried to swap shifts but was unsuccessful. *Id.* at 499. However, she testified that from time-to-time she had requested accommodation to attend church board meetings, stating: "If I knew ahead of time I would ask to work certain shifts. If I didn't know and it was an emergency meeting, if I could trade, I did; if I couldn't, I couldn't go to the meeting." *Id.* at 493. But, of course, her inability to trade may just have been due to the shortness of the notice.

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[6]Ingham admitted that because Finney was temporary, and not permanent, was irrelevant since scheduling requirements for both classes of employees are the same. App. D at 34a-35a.

(9) Petitioner states that efforts were made to temporarily accommodate needs of inspectors for time off for things like college courses or church meetings but were only for temporary periods. Pet. at 12. Although college courses lasted only for a semester, some inspectors continued semester after semester. For example, Deedee Day pursued a degree at Cal State in San Bernardino.[7] App. A at 5a, 7a-8a. And for 10 years a lay minister was accommodated to attend Sunday church in Truckee. *See* App. H *infra* at 69a.[8] Also, Adventist Renee Finney was accommodated for three successive summers: 1980, 1981, and 1982, for a total of 10 months with only one occasion where she agreed to work her Sabbath during the med-fly crisis. RT 694-708.[9]

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[7]Lozano testified she made special arrangements for employees who wanted to be off for school and other reasons. RT 350-51; App. A *infra* at 4a-5a, 7a-9a. She testified there were three criteria she considered when scheduling an employee's needs: (1) she checked to see if she could provide the requested time off; (2) if that did not work, she attempted to give the employee a shift that would provide a sufficient window necessary to meet the employee's needs; and (3) if that failed, she attempted to provide the employee with a shift that enhanced his or her ability to trade. Such arrangements have been used on a long term basis to permit employees to attend college. RT 377-78, 380-82. *See also* App. A *infra* at 5a.

[8]Ingham acknowledged the ten year accommodation of the lay minister in Truckee had been accomplished through voluntary trades, but he was opposed to allowing respondent to be accommodated that way. Ingham speculated a problem might arise at Yermo even though no one else had requested off sundown Friday to sundown Saturday. App. D *infra* at 36a-44a. Ingham testified his refusal to accommodate respondent came from administration who said "thou shalt not . . . accommodate . . . for any reason." *Id.* at 38a.

[9]Ingham admitted if he had known, he would have refused the seasonal employment and religious accommodation of Finney. App. D *infra* at 34a-35a.

REASONS THE PETITION SHOULD BE DENIED

INTRODUCTION

This is a straightforward Title VII case. It was decided on the application of Title VII's religious accommodation provisions, as interpreted by this Court in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977). Although the trial court found in favor of the petitioner, the court of appeals concluded the trial court's findings of undue hardship were clearly erroneous. Respondent further contends when an employer claims it is unable to offer any reasonable accommodation without undue hardship, it must thereafter prove by competent evidence such an accommodation is not possible. *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481, 1489 (10th Cir. 1989). And in so doing, it must demonstrate both the magnitude of, as well as the fact of, the hardship. *Protos v. Volkswagen of America, Inc.*, 797 F.2d 129, 134 (3d Cir. 1986); *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239 (9th Cir. 1981), *cert. denied*, 454 U.S. 1098 (1981). This the trial court failed to do.

Respondent sought accommodation through existing procedures used at Yermo by other employees with regard to scheduling, voluntary trades, and subsequent transfers. The evidence proved the State's policy requiring unpredictability in alteration of work shifts at border stations would not be compromised by such an accommodation. After a full review of the record, the court of appeals agreed.[10]

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[10]There is ample evidence provided by Yermo supervisors that respondent could have been scheduled off during his Sabbath without violating any of the State's legitimate concerns. RT 583; RT 1096. In fact, all employees within each border station did not rotate every month. App. D *infra* at 45a, 47a-49a; RT 1088-89.

As noted by the Ninth Circuit, the State conceded it had an obligation to investigate whether voluntary shift trading was feasible. The court of appeals concluded the district court, relying on the results of a flawed poll of the Yermo employees, had erroneously concluded voluntary shift trades were not feasible.[11] The court of appeals decided the district court erred in relying on those results and further determined the State had failed to offer any probative evidence that would demonstrate a system of voluntary shift trades was infeasible. App. A at 20a-21a.[12]

The Ninth Circuit also concluded the poll results evidence was inadmissible as hearsay and further was not reliable. In fact, the district court itself, though subsequently relying on the results of the poll, properly determined it could not consider testimony about the poll results. App. A *infra* at 21a. Notwithstanding this determination, the trial court then relied expressly on the poll's results when determining whether voluntary shift trades were feasible. App. A at 63a. Thus, in order to prevail, petitioner must convince this Court to overturn the appellate court's evidentiary holding. A review

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[11]Instead of conducting a poll, under the EEOC "Guidelines on Religious Discrimination," 29 C.F.R. § 1605.2(d)(1)(i) (1980), the employer has the duty "to facilitate the securing of voluntary substitutes." The trial court considered such an obligation purely esoteric. RT 463-64.

[12]The trial court's conclusion an accommodation through voluntary trades inferentially would have resulted in an undue hardship was premised upon the its assumption or speculation that at some time in the future respondent would have been unable to secure a voluntary trade. But "[f]indings cannot be based on speculation and conjecture." *Soloman v. Northwestern State Bank*, 327 F.2d 720, 273 (8th Cir. 1984); *see also Brown v. General Motors Corp.*, 601 F.2d 956, 961 (8th Cir. 1979); *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1243 (9th Cir. 1981), *cert. denied*, 454 U.S. 1098 (1981).

of the full record discloses there was no misapplication of the clearly erroneous standard in the court of appeals' reversal of the trial court's finding of undue hardship.

This case is no different from the dozens of other fact-sensitive religious accommodation cases decided in the lower courts since *Hardison*. It has little application beyond the peculiar fact situation present in this case. As will be shown, the court of appeals' decision does not violate the teachings of *Hardison* and is in accord with other lower court decisions; nor does it violate the Establishment Clause or the Tenth Amendment to the United States Constitution.

I. THE COURT OF APPEALS PROPERLY APPLIED BOTH THE CLEARLY ERRONEOUS STANDARD AND APPLICABLE LAW.

This Court in *Anderson v. City of Bessemer*, 470 U.S. 564, 573 (1985), recognized that the meaning of the phrase "clearly erroneous" is not immediately apparent. Citing *United States v. United States Gypsum*, 333 U.S. 364 (1948), the Court found that in applying that test one of the foremost principles is that "[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Id.* That is exactly what the court of appeals did here in concluding the trial court's holding on the "undue hardship" issue was clearly erroneous. App. at 16, 18-21, 24, 27, 29-30.

In struggling to demonstrate that the court of appeals exceeded its role, petitioner incorrectly contends the Ninth Circuit reweighed the evidence in a *de novo* fashion providing as "the most glaring example of this reweighing" the facts relating to the accommodation of a lay minister in Truckee.

Petitioner states: "The district court found that the Truckee episode was evidence that accommodation was likely to cause morale problems and further disruptive requests for accommodation." Pet. at 26. Petitioner argues that the court of appeals had no right to read the evidence as indicating that religious accommodation would be successful. *Id.*

The court of appeals did not determine the State's witness' testimony was not credible either as to the accommodation having been made for 10 years or that the accommodation had come to an end once several other employees filed a grievance also seeking Sundays off for religious reasons. The only point the Ninth Circuit made with regard to the Truckee accommodation appears in a footnote under the heading "Temporary Accommodation and Transfer." The opinion states:

> Finally, Opuku-Boateng proposed a temporary or trial accommodation that would have allowed the Department to experiment with the proposed accommodation and permitted both parties to investigate the possibility that Opuku-Boateng could be employed in another job in the Department or some other State agency, should the accommodation prove infeasible in practice. The district court rejected this suggestion also. We disagree. At the very least, the State should have either temporarily scheduled Opuku-Boateng not to work on the Sabbath or sought to obtain voluntary shift trades for him on a short- or long-term basis.

App. at 29.[13] The court then amplifies its conclusion in

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[13]The State's own "expert," Martina Haleamau, confirmed an accommodation was feasible. She testified it was possible to accommodate respondent "where you didn't have many people wanting to be

footnote 26, stating:

> Lozano testified that she had used three techniques to accommodate requests for time off. She (1) attempted to schedule the employee to provide the requested day off, (2) provided the employee with shifts that would afford him sufficient time to attend to his personal business, or (3) schedule the employee to work a desirable shift to enhance his ability to trade with other employees. RT 377-4 to-20. The record indicates quite clearly that temporary accommodations were possible, at least for shifts that were scheduled at a particular time. Lozano, for example, testified that she accommodated herself and two other inspectors semester-long college courses. RT 377-2 to-25. *The record also shows that a Protestant minister who needed Sunday mornings off had been accommodated for a period of 10 years.*[14]

App. 29-30 n.26 (emphasis supplied). Clearly this comment with regard to the Truckee accommodation cannot be concluded to be a *de novo* reweighing of the evidence.

Petitioner contends the Ninth Circuit ignored the district court's factual finding that accommodating Opuku-Boateng would burden other coworkers who would have to provide cover and be available for emergency assignments. Pet. at

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Sabbathkeepers at the same station and if it was a large station." RT 1212.

[14]Petitioner quibbles with the Ninth Circuit's suggestion that the accommodation was for a period of 10 years. It was the State of California, however, in its court of appeals brief that made this claim. *See* App. H *infra* at 69a. But even if the accommodation lasted only for two or three years, as now suggested by petitioner, it in no way diminishes the fact a temporary accommodation was feasible.

26. This trial court finding, App. at 62, was dealt with in the court's mandatory scheduling portion of its opinion rather than under the voluntary shift trade portion. The district court, of course, did not find that a voluntary trade would result in a discriminatory impact on coworkers.

The court of appeals, App. at 16-17, concluded the district court had too narrowly read *Hardison* so as to proscribe all differences in treatment, noting that in *Hardison* the proposed accommodation would have conflicted with the contractually-established seniority system, thus violating the employee's seniority rights under the collective bargaining agreement but denying him shift preferences. 432 U.S. at 80. The court of appeals noted that in contrast to *Hardison*, in this case the scheduling of shifts was not governed by any collective bargaining agreement, and the proposed accommodation would not have deprived any employee of any contractually-established seniority rights or privileges or indeed any contractually-established rights or privileges. App. at 17.[15]

Petitioner argues, however, that accommodating a Sabbatarian where the employer, having a neutral rotating system, operates a workplace 24 hours a day need not grant special shifts to a Sabbath worshiper. Petitioner cites several lower court decisions including *Beadle v. City of Tampa*, 42 F.3d 633, 635-37 (11th Cir.), *cert. denied*, 115 S. Ct. 2600 (1995); *Beadle v. Hillsborough County Sheriff's Dept.*, 29 F.3d 589, 592 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 2001 (1995); *Wisner v. Truck Central*, 784 F.2d 1571, 1572-74 (11th Cir. 1986); *Brener v. Diagnostic Center Hosp.*, 671 F.2d 141, 144-47 (5th Cir. 1982); *United States v. City of*

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[15]In *Hardison*, 432 U.S. at 81-82, this Court noted seniority systems are afforded special treatment under 42 U.S.C. § 2000e-2(h). *See EEOC v. Arlington Transit Mix, Inc.*, 957 F.2d 219, 222 (6th Cir. 1991).

Albuquerque, 545 F.2d 110, 113-15 (10th Cir. 1976), *cert. denied*, 433 U.S. 909 (1977). Pet. at 4-5. Those cases, however, are clearly distinguishable from the facts here.[16]

In each of those cases (other than *Beadle v. City of Tampa)*, voluntary trades were permitted, but the employer was asked by an employee to deny the shift and job preference of other employees solely to accommodate that employee's religious needs. In each case there was a rotating shift that arguably created a vested claim on the part of other employees for specific days off, and it was argued such an arrangement is similar in effect to the collective bargaining agreement in *Hardison* which contractually provides for scheduling on the basis of seniority. In *Beadle v. City of Tampa*, 42 F.3d 633 (11th Cir. 1995), no shift trades were permitted.

Under the border inspectors' arrangement, however, each employee at Yermo had an equal right to request that the scheduler take into consideration special needs they had for their days off -- whether it be for schooling, for little league, or for religious reasons. The scheduling procedure followed in Yermo clearly created no vested claim to specific days off. *See* App. A *infra* at 4a-5a, 10a, 19a-20a.

Petitioner cites not one case that suggests when voluntary trades are generally permitted, shift trades would not be required as part of an accommodation arrangement. As the court of appeals noted, the district court read *Hardison* too narrowly, finding a discriminatory preference if other

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[16]Likewise, *Eversley v. MBank Dallas*, 843 F.2d 172 (5th Cir. 1988), cited by petitioner at page 19, is also distinguishable. There the court held "that forcing other employees, over their expressed refusal, to switch from the day shift to the night shift would be unreasonable and an undue hardship." *Id.* at 176.

employees work more Friday nights and Saturday shifts.

Here the court of appeals noted that "unlike in *Hardison*, there is no evidence that the proposed shift-scheduling arrangement would, in the end, have granted Opuku-Boateng a privilege or imposed more than a *de minimis* burden on other employees." App. at 18. In contrast, here, as the district court concluded, all employees at the Yermo station were required to work "an equal number of undesirable weekend, holiday, and night shifts." App. at 18-19.

After reviewing the full trial record, the court of appeals found that "[n]o evidence was offered that the shift arrangements could not have been arranged in a manner that would have insured that Opuku-Boateng and other employees all receive an equal number of undesirable shifts. Therefore, the State failed to carry its burden of demonstrating that Opuku-Boateng's practice of observing the Sabbath could not have been accommodated through scheduling arrangements without affording him preferential treatment." *Id.* at 19.

Finally, the court of appeals noted that respondent had himself proposed to merely use the voluntary shift trades. Because this arrangement was voluntary and a practice generally employed by the Yermo employees, there would have been no preferential treatment discriminating against coworkers. App. at 20.

The court of appeals found its conclusion to be in accord with other appellate court decisions, such as *Brown v. General Motors Corp.*, 601 F.2d 956 (8th Cir. 1979). That court stated that

> finding that a proposed accommodation would entail some form of discrimination does not end the enquiry. The

> Court in *Hardison* held that differential treatment resulting from accommodation runs afoul of section 2000e-2(a)(1) if it: (1) would compromise other employees' contractual seniority rights as secured by a collective bargaining agreement; or (2) would confer a privilege, the cost of which was more than *de minimis*, solely on the basis of the recipient's religious beliefs. 432 U.S. at 81-85, 97 S. Ct. 2264. Neither of these situations is present in this case.

Id. at 962.

Permitting Opuku-Boateng, like other employees, to request days off prior to scheduling and in accordance with long-established practice at Yermo to trade with other employees once the schedule is posted would not constitute a preference solely on the basis of respondent's religious beliefs. *See Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 71 (1986); *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1513 n.7 (9th Cir. 1989); *EEOC v. Universal Mfg. Corp.*, 914 F.2d 71, 73 n.3 and 74 n.4 (5th Cir. 1990).

The trial court made two findings with regard to voluntary trades: (1) the results of a poll indicated that none of the employees was willing to accommodate Opuku-Boateng on a permanent basis; and (2) even if employees were willing to trade with Opuku-Boateng on a permanent basis, such would violate the Department's policy of avoiding consistent scheduling patterns. App. at 63-64.

The Ninth Circuit concluded the poll was flawed, and testimony regarding the results of the poll constituted inadmissible hearsay which could not be considered by the district court. Thus, the record does not support the conclusion that Yermo station employees were unwilling to

make a reasonable accommodation. After reviewing the evidence, the court of appeals determined that "[t]he State failed to conduct the type of inquiry into the feasibility of trading shifts that would have been necessary to answer that question one way or the other, thus to enable it to carry its burden." App. at 24.[17]

The court of appeals found that "[a]lthough the Department had a legitimate interest in varying work schedules to discourage bribery and dishonesty, there is no probative evidence that suggests that accommodating Opuku-Boateng's religious beliefs would have resulted in a schedule that was so predictable . . . that it would have jeopardized the Department's security interests." App. at 26. The record is clear on this point. *See* RT 583.

II. THE COURT OF APPEALS DID NOT ERR IN DETERMINING THE RESULTS OF THE POLL SHOULD NOT HAVE BEEN RELIED UPON.

Petitioner argues that the Ninth Circuit reevaluated the reliability of witnesses' testimony. Pet. at 27. Petitioner argues that surveys and polls can be admitted as evidence under either: (1) the hearsay exception for state of mind; (2) the general hearsay exception for otherwise trustworthy evidence, or (3) as the basis for an expert opinion. Pet. at 28 n.6.

At the trial the State attempted to introduce evidence concerning a poll it took. The record demonstrates the following with respect to that poll:

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[17] *See* a similar holding in *Boomsma v. Greyhound Food Management, Inc.*, 639 F. Supp. 1448, 1455 (W.D. Mich. 1986).

(1) Ingham instructed someone at Yermo to take a verbal poll of employees to ascertain how many would be willing to trade shifts. RT 987.

(2) The closest Ingham could come to identifying when the poll was taken was within a month or so after he spoke with Herb Cohen, the Department's in-house counsel, about Opuku-Boateng's need to be off. RT 988-89. In fact, the court asked Ingham when the poll was taken, but Ingham could not remember. RT 1000-01. When Ingham was asked whether the poll was taken before or after a final decision was made on Opuku-Boateng's employment, Ingham responded, "I can't recall." RT 10005-06. Further probing, counsel asked Ingham: "Now do you have a recollection when that decision was made terminating the process to hire . . . whether the poll had been taken or not at that point?" Ingham replied: "I do not recall." RT 10009.

(3) In fact, Ingham could not even remember whether it was he or some member of his staff who may have requested the poll be taken. RT 1037-38. Ingham's deposition was read to him at the trial. It disclosed Ingham had asked Gray to take a poll. The deposition revealed Ingham received the results of the poll a week after the poll was requested. He further testified he did not know whether the employees were polled or what questions were asked. RT 1039-45. Gray testified he had no knowledge of what steps were taken by the Department concerning Opuku-Boateng. RT 907.

(4) Whitacre, Yermo's acting supervisor, testified that his first day back to work following vacation was November 6, and he did not remember hearing about Opuku-Boateng any time in October. RT 528. Whitacre recalled a poll being taken but did not remember how many were polled. He testified: "Obviously not everybody could have been

contacted." RT 537. Whitacre's deposition revealed he did not recall actually taking the poll. RT 537-38. At the trial Whitacre testified he believed there was an informal poll taken to determine whether anyone would be willing to trade shifts on a permanent basis. RT 536.

(5) Another Yermo employee, Maria Lozano, recalled that prior to October 28, when Opuku-Boateng first came to Yermo, Sandridge and supervisors Whitacre and Sholquist informed her a potential employee would not be able to work Fridays, Saturdays, and Sundays because he was a Seventh-day Adventist. RT 344, 346-48, 443. Sandridge told Lozano respondent's religion prevented him from working Fridays, Saturdays, and Sundays. Lozano spoke with other employees at Yermo. App. A *infra* at 1a-2a. Lozano said Whitacre asked her if she would be willing to trade with respondent so he could be off for religious reasons. Lozano informed Whitacre she would be willing to trade with Opuku-Boateng some of the time, but not always. RT 444-45. She also testified she believed others would be willing to swap with Opuku-Boateng. When asked about the possibility of trading, however, she had understood Opuku-Boateng required a 3-day weekend off which she considered unfair. RT 445-46, 457-58.

(6) Ingham never considered polling employees at the Meyers Inspection Station where the Department had already accommodated an employee, Renee Finney, as a seasonal employee. Counsel suggested if Ingham had relocated Opuku-Boateng to a station such as Meyers where it might have been easier to accommodate him, it would be important to know how those employees felt about trading. Ingham responded: "In retrospect, I agree with you." App. D *infra* at 50a.

The trial court, when considering the polling testimony, ruled:

> I'm admitting the evidence that a poll -- the fact that a poll was taken itself can be hearsay, but it is received of course not for the truth of what was developed. . . . I'm going to permit him to testify to what results were reported to him with the understanding that *they are not being accepted by the Court as proof of the truth of the outcome of the poll*, and the Court has to recognize that depending upon how the question is asked, the answer may be different.

RT 1003-04 (emphasis supplied). Thus, the court of appeals correctly held it improper for the trial court to find that "the informal poll taken by defendants indicated that none of the employees were [sic] willing to accommodate plaintiff on a permanent basis, . . . [and] it would have been only a matter of time before plaintiff would have been unable to find a replacement to work his designated shift." App. at 63. Undoubtedly, this error directly affected the outcome of this case.

Although petitioner suggests in spite of the trial court's correct ruling that poll results testimony could not be considered, it still contends the court of appeals was wrong in its evidentiary conclusion on this question. But none of the exceptions to the hearsay rule relied upon by petitioner permits a consideration of this poll's results for its truth. *Pittsburgh Press Club v. United States*, 579 F.2d 751 (3d Cir. 1978), relied upon by petitioner, suggests that any poll admitted into evidence must not be unfairly worded, *id.* at 758, and must be objective, scientifically designed, and impartial. *Id.* at 759. The court in *Pittsburgh Press Club* also suggests that poll interviewers must have no interest in the litigation. *Id.* at 758.

Many courts, in determining whether to admit surveys and

polls, have looked to Judge Feinberg's scholarly and well-reasoned opinion in *Zippo Mfg. Co. v. Rogers Imports*, 216 F. Supp. 670, 682 (S.D. N.Y. 1963). He states that whether or not the survey may be accepted as trustworthy depends on whether the "questions are unfairly worded to suggest answers favorable to the party sponsoring the survey." He also states that "the same result would follow if the interviewers asked fair questions in a leading manner."

In *Toys "R" Us, Inc. v. Canarsie Kiddie Shop, Inc.*, 559 F. Supp. 1189, 1205 (E.D. N.Y. 1983), the court applied a strict standard in evaluating the trustworthiness of surveys, stating:

> The trustworthiness of surveys depends upon foundation evidence that (1) the "universe" was properly defined, (2) a representative sample of that universe was selected, (3) *the questions to be asked of interviewees were framed in a clear, precise and non-leading manner, (4) sound interview procedures were followed by competent interviewers who had no knowledge of the litigation or the purpose for which the survey was conducted, (5) the data gathered was accurately reported,* (6) the data was analyzed in accordance with accepted statistical principles, and (7) *objectivity of the entire process was assured.* Failure to satisfy one or more of these criteria may lead to the exclusion of the survey.

Id. at 774 (emphasis supplied). Clearly, the claimed poll ultimately relied upon by the trial court here failed at least points 3, 4, and 7, and perhaps 5. Nontheless, the court made no finding as to the trustworthiness of the poll.

Petitioner suggests that in spite of the court's ruling excluding the poll results testimony, nevertheless it could be considered because it was testified to by an expert. It was not

admissible through Ingham's testimony because his testimony was dominated by his reliance on information excluded for reasons that bear on the reliability of the poll's results. *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 505 F. Supp. 1313, 1330 (E.D. Pa. 1981). Also, as the court stated in *Standard Oil Co. of California v. Moore*, 251 F.2d 188 (9th Cir. 1957), *cert. denied*, 356 U.S. 975 (1958), "it is for the trial court to determine, in the exercise of its discretion, whether the expert's sources of information are sufficiently reliable." Clearly here the court made no such finding and specifically held that the results of the poll could not be considered. For the above reasons, the court of appeals' pivotal ruling concerning the trial court's consideration of the poll results is not subject to challenge.

III. THE RELIGIOUS ACCOMMODATION REQUIRED BY THE NINTH CIRCUIT IN THIS CASE DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE OR THE TENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Petitioner raises both the Establishment Clause and Tenth Amendment defenses for the first time before this Court. Such defenses were not raised at the trial nor in the court of appeals even though the relief granted by the court of appeals was precisely the relief requested in the trial court by respondent. Furthermore, petitioner cites no authority for its Tenth Amendment argument. Petitioner's arguments for both of its constitutional assertions are nearly identical.

As the Ninth Circuit observed, coworkers would not be burdened by available accommodations -- principally voluntary trades. Thus, using the accommodation process for Opuku-

Boateng would not threaten the workplace morale.[18] This workplace morale argument is disingenuous in light of petitioner's statement in its Post-Trial Brief: "At no time has defendant suggested that the 'morale' of the Yermo station would inevitably suffer if plaintiff were to be accommodated." App. G *infra* at 68a. Petitioner's bold assertion that accommodating respondent would undermine the State's policy of having unpredictable shifts to avoid collusion is without merit. All that was required under the policy was there be some change from time-to-time so that truckers did not become too acquainted with the inspectors. RT 583, 1096.

Equally without merit is petitioner's claim that accommodating respondent would require the State to change the way it schedules shifts. The court of appeals only suggested that in the Department's initial "investigation of the feasibility of an accommodation" the Department could have,

> for example, first determined the total number of Sabbath shifts Opuku-Boateng would be assigned over the forthcoming year as well as the projected schedules for that period of the other employees. Then by asking the individuals polled how many specific shifts they would be willing to trade . . ., the State could have determined whether the other employees . . . would collectively have been willing to make the necessary accommodation.

App. at 24 n.22.

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[18]The Civil Rights Act was drafted to protect the discrete and sometimes unpopular rights of individuals against the potentially oppressive mood of the majority. 42 U.S.C. § 2000e(j) is one example of that important purpose. *See Anderson v. General Dynamics Convair Aerospace Div.*, 589 F.2d 397, 400-01 (9th Cir. 1978), *cert. denied*, 442 U.S. 921 (1979).

Finally, petitioner's argument that the Ninth Circuit requires "that respondent be transferred to some other job in State service if his temporary accommodation . . . fails" is incorrect. Pet. at 23. Also incorrect is petitioner's assertion that a transfer would violate State Civil Service requirements. *Id.* at 23-24. What the Ninth Circuit suggested was that a temporary accommodation "would have . . . permitted both parties to investigate the possibility" of other state employment. App. at 29-30.

Petitioner overstates the court of appeals' holding in its attempt to make that court's decision appear unconstitutional. The court of appeals did not order petitioner to transfer respondent to some other job in state service contrary to the State civil service requirements, as suggested by petitioner. Pet. at 23-24.

The plant quarantine inspector position was an entry level position, and it is not unusual for employees in this classification to transfer to other Department positions. App. C *infra* at 32a. There is uncontradicted testimony from one of the State's witnesses that once Opuku-Boateng had completed probation, he could have transferred to a position such as an agricultural biologist or a grain and commodity inspector without taking an examination under the civil service rules because the transfer would be to a position in a class within 10% of his salary and responsibility level. *Id.* at 31a-32a. In fact, "[t]here are a variety of things that you can do for a permanent employee" to accommodate his/her religious requirements to be off work certain days. *Id.* at 27a-32a.

What the Ninth Circuit's decision requires in this case is that respondent be provided the same opportunities for accommodation as are generally available to all other employees employed as plant quarantine inspectors for the

State of California. They are: to give equal consideration to his request for days off prior to scheduling, to take into consideration his religious needs in the scheduling process so as to enhance his ability to trade with other employees, to permit him to engage in voluntary trades with other employees, and to provide the same consideration for a transfer to another position as is available to all employees under the civil service rules. *See Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 71 (1986). Such accommodation requirements do not advance religion. *See Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 712 (1985) (O'Connor, J., concurring); *Edwards v. Aguillard*, 482 U.S. 578, 616-18 (1987) (Scalia, J., dissenting); *Gillette V. United States*, 401 U.S. 437, 454 (1971); *Nottelson v. Smith Steel Workers D.A.L.U. 19806*, 646 F.2d 445, 455 (7th Cir. 1981).

CONCLUSION

For all the foregoing reasons, the State of California's Petition for Writ of Certiorari should be denied.

Dated: April 14, 1997

Respectfully submitted,

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APPENDIX

APPENDIX A

REPORTER'S TRANSCRIPT ON APPEAL

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Maria Lozano
Direct Examination by Mr. Boothby

[p. 373]

Q I don't remember exactly where we left off, but I think we were talking yesterday about a conversation, for instance, that you had with Mr. Sandridge. Did you also talk to other employees about what Mr. Sandridge had told you about Mr. Boateng coming and that he was -- because of his religious concerns was not able to work Friday, Saturday, and Sunday? Did you talk to other employees about that?

A Yes, sir.

Q Was that conversation before Mr. Boateng came to the station?

A Yes, sir.

Q All right. At any point in time that You can recall, did anyone in management or in supervision with the department say anything to you concerning the fact that there might be a duty to accommodate the religious needs of employees?

A Um, Mr. Whitacre asked me if I would be willing to trade Mr. Boateng.

Q Okay. Did he tell you that there was some federal or state requirement to look at that as a possibility?

A No, sir.

[p. 374]

Q And as I understand it, you were under the impression at the time that we were talking about three days; is that true?

A Uh, yes, sir.

Q Let's talk a little bit about trades. Did you ever -- were you ever involved in trading with other employees to either accommodate your own needs to be off or to accommodate another employees needs to be off?

A Yes, sir.

Q And can you give me illustration of the kind of events or concerns or interests that would cause you for your purposes, to trade?

A Um, I have nephews who play baseball, so sometimes if I'm working a swing shift I'll ask someone who's working a day shift or 10:00 to 6:00 to trade so I can attend their game.

Q All right. Any other reasons?.

A Um, I've traded sometimes so I can attend a medical appointment that I wasn't able to give my supervisor pre -- or my station manager pre-advance warning, because normally I try and schedule my medical appointments on my days off; but sometimes I can't, so if it turns out that I can't, then I -- if it's in the morning I'll try and trade for a swing shift so I can go in the morning and work at night.

[p. 375]

Q How do you go about doing that? Let's say that you want to be off in order to go attend a baseball game -- your nephew, is it?

A Yes, sir.

Q How do you go about doing that? Do you look at the schedule and find out somebody that might not be working at that time?

A No, sir, I look at the schedule to see who's working and, um, then I'll just ask them. I'll say whoever it is, I'll say "could you trade me because I'd like to go to my nephew's baseball game, and if you ever need a trade then later I'll trade you if I can."

Q How long -- how often would this occur that you would -- not just for a baseball game, but trade for any purposes, let's say, within the course of a month?

A Maybe once, maybe never.

Q All right. Did you ever accommodate some other employees who wanted to be off?

A Yes sir.

Q And would you normally agree to a trade if another employee asked you if it did not conflict, with something that you had planned?

A Yes, sir.

Q Did you normally find other employees to accommodate your needs when they didn't have something [p. 376] that they were committed to?

A Yes, sir.

Q Did you find that there was generally a spirit amongst the employees at Yermo to accommodate one another's scheduling' needs and to trade as best they could?

A Sometimes.

Q Were there certain people that were more accommodating than others?

A Yes.

Q All right. Would you tend to go to the people that were more accommodating?

A Yes, sir.

Q If Mr. Boateng had been, employed there, would you have treated him the same as any other employee in considering his needs for trade?

A Yes, sir.

Q All right. Nov are you aware of any inspectors at the Yermo station that have gone to school while being employed there?

A Yes, sir.

Q And how would that be -- now you've done scheduling?

A Yes, sir.

Q All right. Have you scheduled people to be [p. 377] off for school purposes?

A Um, no, not normally.

Q Have you done it at all?

A Um, what you do, I've given them time off for school but, you know, as the schedule -- like they have to have -- if we're talking about rank and file, they have to have

two days off in a seven-day work week. So if it works out -- if the schedule works out that there's people, there's plenty of people, then I'll try and give them a day off that has their school; but if not, I'll try to give them a shift where they can go or possibly there's enough people where they can trade someone.

Q So you look at really three factors. You look at giving them a day off, and if that doesn't work out, giving them a shift that would give them that window of time that's necessary for the school, or the third possibility is giving them a shift that perhaps enhances their ability. to trade?

A That's correct, sir.

Q Who have you done that for?

A Um, I've done that for Deedee Day, I've done that for myself because I go to school, I've done that for Sonia Minios. That's all who I can think of right now, sir.

[p. 378]

Q All right. You indicated that you've done it for yourself, that you have worked out an arrangement so you could go to school; is that true?

A Yes, sir.

Q What are we talking about, college?

A Yes, sir.

Q And so are we talking about at least one or two days a week that you have at least a period of time that you have to be or you should be or supposed to be at school on a regular basis?

A The way I go to school right now, I go to school on Tuesdays and Thursdays, evenings --

Q All right.

A -- from 7:00 to 9:50.

Q How do you work out -- make certain, or at least attempting to make certain, that you're going to be off so that you can attend school on a regular basis at those times?

A Um, well, see, I'm not on a 40-hour work week.

Q All right.

A Okay. So my schedule says that I can be off anywhere from a day -- or excuse me, I can work anywhere from a day to 18 days straight, but -- and depending on how many Saturdays and Sundays there are in the month and depending if there's any holidays in the month, [p. 379] those are the days off that I have. So I either work day shifts or I'll work graveyards, or if I work swing shift I'll schedule myself so possibly I can trade with somebody.

Q All right. Now you indicated that of course there's Saturday and Sunday and there's holidays?

A Yes, sir.

Q And as I understand it, am I correct that at least the other inspectors have a 40-hour work week and that recognizes that there's a five-day week, and they also get off a holiday if there's a holiday that falls in a month; is that true?

A That's correct, sir.

Q Okay. Now because you're in school, do you tend to give up your Saturdays and Sundays and holiday in order to be able to attend school as part of your scheduling arrangement?

A Um, I try to.

Q So maybe Saturday and Sunday is preferred by some, but because of your schooling you might prefer to be off on whatever day your school on; is that correct?

A Um, not all the time.

Q Not all the time; some of the time?

A Sometimes yes, sometimes no.

[p. 380]

Q Okay. Now with reference to Deedee Day --

A Yes, sir.

Q -- now she's a regular 40-hour employee, is she not?

A Yes, sir.

Q All right. She would be working the same schedule as the other inspectors, being rotated in the various shifts just like any other inspector; is that true?

A Yes, sir.

Q How long has she been attending school?

A Um, I'm not really certain. I know that she was going to school when she was working at Long Valley inspection station, and I know that she's going to school now.

Q Is she pursuing -- to your knowledge, is she pursuing a degree in psychology?

A Yes, sir, that's correct.

Q And do you know what school she attends?

A She's going to Cal State San Bernadino.

Q So she would have to travel from Yermo to San Bernadino to go to college; is that true?

A Yes, sir.

Q Do you know how many days a week?

A No, sir, I don't at this time.

[p. 381]

Q Do you know if it's more than one day a week?

A I believe so.

Q And although it may change from semester to semester, would there be certain days that she needs off in order to do that?

A Um, I don't know. I guess.

Q Well, is that the way that she -- her schedule has been changed by the three methods that you've suggested in the scheduling process?

A Yes, that's normally the way I would try and schedule her.

Q And you've done that, have you not?

A Yes, sir.

Q And to your knowledge, has she attended college?

A Yes, sir.

Q All right. Do you know how many years it's been that you have known of her attending college? Can you quantify it in years?

A Um, not really. I know she went to school at Long Valley.

Q When was that?

A She came back to Yermo last year, I believe, and then prior to that she was coming from Long Valley, so I know she went to school in Long Valley.

[p. 382]

Q Is she still going to school?

A Yes, sir.

Q And she's still being accommodated in that fashion; is that true?

A Yes, sir.

Q Okay. Do you know a Ben Blinko?

A Yes, sir.

Q Has he attended school also by this type of arrangement?

A I can only assume he has, sir. I don't know.

Q Well, I don't want you to assume. Do you have knowledge that --

A I know he's gone to school, yes, sir.

Q How about Wayne Laslow?

A Leslie. Yes, I know he's going to school, sir.

Q Has he been accommodated in that same fashion, to your knowledge?

A I believe so, yes, sir.

Q Are there people that are permanent employees, permanent hires, at Yermo?

A Yes, sir.

Q Now as I understand your testimony -- let's take you, for instance. You would attempt to get -- would you attempt to get your request in -- when somebody else was doing the scheduling, would you [p. 383] attempt to get your request in at a certain time?

A Yes, sir.

Q And as I understand it, it's so many days prior to the posting of the schedule; is that correct?

A Yes, sir. The schedule -- your requests have to be in by the 29th of each month.

Q Prior to the schedule -- the posting?

A Yes, sir.

Q Okay. And the posting is supposed to be on the 15th of the month prior to when the schedule takes effect; is that true?

A That is correct, sir.

Q Now are there times when the schedule has already been posted and so the time in which you have to get your request in has already passed when you find that you need or want to be off for some reason?

A Yes, sir.

Q Have you ever made a request -- I'm not talking about a trade yet, but a request for a scheduling change after the time has come and gone to put your request in?

A Are you asking me if I've ever come to a point where it's past the time to hand in the note and I need to be off for something?

Q Yes.

[p. 384]

A Yes, that's happened to me before, sir.

Q Have you gone to the person who's doing the scheduling and asked if they can make an adjustment?

A No, normally I'll wait to see how the schedule turns out and then go from there and see if I can trade around.

Q All right. So you normally do that by trade?

A Yes, sir.

Q Okay. Are there certain days of the week that based upon your -- what is it, eleven years now experience there?

A Twelve and a half.

Q Twelve and a half years. Based upon your twelve and a half years of experience at Yermo, are there certain days that you have found are fairly consistently heavier than other days?

A Yes, sir.

Q And what days are those?

A Um, Fridays, Saturdays, Sundays, and Mondays; and then sometimes the middle of the week, Wednesday.

Q All right. Now in your deposition you ranked those for me. Can you rank those for me?

A Um, Sunday is one, Friday is two, Saturday and Sunday would be probably tied for third, and then Wednesday could be tied for third, too; just depends.

[p. 385]

Q I thought you told me Sunday was one.

A Sunday was number one, yes, sir. That's what I said, sir.

Q All right. And Friday is two?

A Yes, sir.

Q Now what's tied with Saturday?

A Saturday, Monday, and Wednesday can all tie.

Q Saturday, Sunday, and Monday are about the same?

A No, Saturday, Monday, and Wednesday, sir.

Q Okay. I'm sorry. When you say -- when you rank them one, two, three, and whatever, are you saying that Sunday, based upon your experience, is the busiest day?

A Yes, sir.

Q And Friday is the next busiest day?

A Yes, sir.

Q And then Monday, Saturday, and Wednesday, they tend to be, give or take changes, I suppose, the next busiest days?

A Yes, sir.

Q All right. And then I suppose the remaining days of the week, are they about the same or are there certain days that are the least -- is there a last on the list?

[p. 386]

A They can all be kind of busy, but they're not too bad.

Q All right. Do you know why Sunday tends to be the busiest day?

A Well, normally everybody is coming back from either going to Vegas or everybody is coming back from their trip. If they don't have to be to work Monday, then they'll probably come in on Monday. Sunday we're swamped.

Q Is that true all day long or does it start at a certain time on Sunday, based upon your experience?

A It will normally start at about anywhere from midnight to 2:00 or 3:00, or sometimes even 1:00 o'clock in the morning and the traffic starts.

Q Would the graveyard shift on Sunday then tend to be a heavy. shift?

A Yes, sir.

Q A person -- how many people work that graveyard shift normally, let's say in November?

A In November? Are you talking formerly or presently?

Q Let's take 1982.

A 1982, there would be in November, um, three people.

Q Three people. And would those three people [p. 387] generally be having to move pretty quick in order to process the cars through?

A Yes, sir.

Q All right. And then it continues on up until approximately when on Sunday?

A Well, like I said, sir, it will start sometimes anywhere from 12:00 to 1:00, and it will on -- sometimes it will stay busy until almost noon Monday.

Q I see. Now Friday, you indicated that was the next busiest; is that because when that's when people are going?

A That's when people are coming into the state.

Q Coming into the state?

A Coming into the state.

Q On Friday?

A Yes, sir. They're coming from Las Vegas or from many points from the Midwest to East coast they're coming in, but the greatest exodus is from Nevada. All the Nevada people seem to come in on Friday.

Q Is that right?

A Yeah.

Q When does that start?

A That will normally start -- it starts normally like about 4:00 or 5:00 o'clock in the morning with people coming in for work and it goes on from there.

[p. 388]

Q On Friday morning?

A Yes, sir.

Q So the person that would be on graveyard even on Friday morning would have a fairly busy time; is that true?

A Yes, sir.

Q Now do you know why Saturday tends not to be as busy a day as Sunday or Friday or perhaps ranking with Monday?

A Um, it depends. If there's a holiday, like say if Christmas is on Sunday or if some other holiday is on Sunday, then most people then will rush by Saturday because if they have to get to Los Angeles or any place in the south, in Southern California, they would almost have to be -- like say if it's some type of event, even like Super Bowl, okay, they would almost have to be in our station by at least 1:00 o'clock or 2:00 o'clock in order to make it to L.A. to see the Super Bowl because the traffic is so congested in Los Angeles or in San Diego. So it depends; Saturday can be what's left over from Friday or it could be pretty steady, but it's normally always steady; and sometimes it can be very heavy.

Q There are certain times of the year, as I understand it, that are heavier than others; is that [p. 389] true?

A Yes, sir.

Q Would that be the summertime, basically?

A Summertime, and then Thanksgiving, Christmas, Easter, spring break, Presidents' birthdays in February, Mother's Day, Father's Day, New Year's, Memorial Day, Labor Day weekend when it's Jerry Lewis Telethon in Vegas or in California, depending on where they schedule it, Super Bowl Sunday -- just depends; playoffs, World Series, just depends.

Q Let's take Thanksgiving and Christmastime.

A Yes, sir.

Q Based upon your experience, does the station manager bring in seasonal people, college students, to assist during those times?

A Um, yes, sir.

Q So you have more help during those times where you bring in college students that perhaps are off during that short vacation period and they work to augment the staff that's there, is that what happens?

A Well, we have seasonals that -- during that time that were six-month and nine-month -- nine months' employment, different to what they are now. Before --

Q Let's talk about '82.

A Okay. In '82 there were six-month and [p. 390] nine-month seasonals, they were called TAUs, and there were overlapping TAUs. So for Thanksgiving you'd probably have, depending on how many was allowed to you from the department, we'd have maybe two, maybe three maybe four, depending, and they would be working in that time, but they'd work during the whole month, so, um -- see, now they're ATWs; they're called "as time worked," so they're only scheduled -- they're scheduled a lot differently from what they were back then.

Q Let me ask you this, in '82, just so that I'm sure what you're saying, during the Christmas recess time when you had heavier traffic and during the Thanksgiving time when you had heavier traffic, did you have -- whatever you called them, but this extra help come in during those periods of time?

A They would be scheduled to work, yes, sir.

Q All right. So even though you had heavier traffic, you had more help?

A That would be the norm.

Q And that's also true during the summertime?

A Yes, sir.

Q I'd like. to have you just tell me a few things about the schedule. If you would turn with me to Exhibit 24, and what I want to do is to look at your scheduling on some of the these days and have you tell [p. 391] me if you would, what it means. For instance, Exhibit 24, if you will look at 4/1 to 4/30/82. Do you see that?

A Yes, sir.

* * * *

[p. 393]

Q Would you turn with me over to -- it's kind of cut off, so it's 9/1 --

A Oh, I see, okay.

Q Do you see that one?

A Yes, sir.

Q All right. Now your name appears maybe a little more than half way down. Do you see that, number 12?

A Yes, sir.

Q All right. It shows, for instance -- I just want to ask you about this -- about a third of the way over, the second time that you're being -- the second block of time that you appear, under Friday it shows shift three, shift three, shift four, shift two, shift two, shift two, shift two, shift one, shift one, and shift one. Can you tell me why during a given block in time you wouldn't be continually working the same shift?

A Um, because we work rotational shifts, sir. That means that we work days, swings, graveyards. We may not work a constant -- like say, for example, of these one, two, three, four, five, six, seven, eight, nine -- of these

ten days that I was scheduled to work, that doesn't necessarily mean I'll work a block series of three shifts or a block series of two shifts or a block series of one shift. I work a rotational shift, [p. 394] so I can work a three and then they put a four to transition you over to a two so that you don't come back -- it's not so much of an early morning. But I can work threes, twos, and ones. What I can't work is a three, one, two; that's not consistent.

Q Because it would be back-to-back? .

A Um, exactly. And you have to have an eight-hour break. That's why you can't work -- that's why I couldn't work a four to a graveyard, because that's not enough time to rest. But I could work a two and then come back and work a graveyard.

Q You do notice that Mr. Street, who's number three on there, he almost consistently worked the third shift. There were some alterations, but during most of the month he worked the third shift.

A Yes, sir, but he's a supervisor, sir.

Q Is that why that would be?

A Well, maybe, because if you look at Mr. Whitacre, sometime he was broken up, but it depends on what was needed.

Q Well, look at the seventh one down, Mr. R-a-c-h -- and I'm not sure of the rest.

A Rachi.

Q Rachi, is it?

A Yes, sir.

[p. 395]

Q Now he worked the second shift during the first --

A Eight days.

Q Yeah. Now whereas yours was broken up, his isn't broken up. Was he a supervisor?

A No, he's a rank and file.

Q When the scheduler made up the schedule, was it pretty much discretionary with the scheduler whether to schedule them eight, times the same shift or to break it up like they broke yours up?

A It just depends on how -- what's needed.

Q Depends on what's needed; and who decides what's needed?

A Whoever makes the schedule out.

Q And does that depend on the various requests hat come in from the employees?

A Exactly, sir.

Q All right. I'd like to have you look at 11/2 to 12/1/82.

A Yes, sir.

Q Now as I understand it, the scheduling is based to some extent on the number of vehicles that are coming through, when there's heavier traffic or lighter traffic; is that true?

A Yes, sir.

[p. 396]

Q It looks to me like -- I may be in error, but it looks to me like at that particular time with some few exceptions you

had the same number of people on every day. You had nine people on and six people off during the majority of the time; is that true?

A Yes, sir.

[p. 397]

Q Let's take a look at March 2 to March 31, 1983. Now you notice that during more than half you had ten people on and either five or six people off, and in some instances four people off during most of the time. And you come to Saturday and Sunday you have only, as I understand, eight people on and five people off. And then on the last one you have, on Tuesday, you have eleven people on. Do you know why that would be?

A It appears like for myself that I probably would have been working had I not asked for that time off.

Q So they accommodated you, as I understand it, [p. 398] because you wanted to be off?

A Yes. My name -- it has two holiday credits. That means that I -- I can't remember back then what I had planned, but I must have asked for some time off to go someplace.

Q That was to which day now, which date?

A On Sunday and Monday.

Q 19th and 20th?

A Yes, sir.

Q And you've ranked those, at least Sunday, as the heaviest traffic day; in that not true?

A Yes, sir.

Q And they wound up with eight people?

A Yes, sir.

Q I want to ask you, what does it mean, for instance, on the 11th; you see Friday the 11th?

A Yes, sir.

Q And Saturday the 12th, and it runs on through the 15th; it shows a one and than there's a kind of diagonal line and a two. What does that mean?

A Oh, you mean on my name?

Q On yours, yes.

A It means that I traded. I was scheduled to work a day shift, and I traded with with Miss Martinez for her graveyard. I traded from the 11th to the 15th; [p. 399] I traded with her to work those graves so that I could get off early.

Q I see.

A A lot of time we do that. We trade so that we can get off on a graveyard, and that allows us to leave a day early or get all of our stuff together for whatever reason.

Q That's fairly common, isn't it, doing things like that?

A Trading, yes, sir.

* * * *

APPENDIX B

REPORTER'S TRANSCRIPT ON APPEAL
VOLUME III OF VI pp. 485-492

Elisa Martinez
Direct Examination by Mr. Boothby

[p. 485]

Q Do you recall what year it was that you became a permanent employee at Yermo?

A 1982.

Q And do you know what month?

A If I'm not mistaken, it was probably around October; September or October.

Q I'd like to have you take a look at the exhibit book that's in front of you there, and you'll notice that it's tabbed; it has tabs that indicate the various exhibit numbers. Do you see that?

A Yes.

Q Would you turn to Exhibit 24?

A Okay.

* * * *

[p. 486]

Q All right. I'd like to have you take a look, if you would, at the August 1 to August 31, '82 schedule — I'm sorry, I've got the wrong one; it's the next one, 9/1. Do you see that?

A Yes.

Q All right. Now, it looks to me, and correct me [p.487] if I'm wrong, that from the 17th of that month -- that would be the 17th of September -- through the end of that month, you were on the third shift; is that what that indicates?

A You're asking me on the 17th ?

Q Well, from the 17th on to the end of the month. You either were working on the third shift or not working at all; is that correct?

A 4:00 to midnight, the third shift.

Q Yes, I believe that would be the 4:00 to midnight.

* * * *

[p.488]

Q BY MR. BOOTHBY: Is that what that indicates, you were working the third -- or at least scheduled to work the third shift?

A Yes.

Q All right. Would you take a look at the next month, 10/1 to 11/1/82? And looking at your name, it appears to me that you were scheduled to work, except for the time that you were off, the third shift at least during most of that month up to -- and I can't really tell -- the last three or four days of that month; would that be correct?

A That's what it looks like.

Q All right. And then on the next month, 11/2 to 12 --11/2 to 12/1/82, it appears -- I'm sorry, let's take that first two months. Was there some reason that you were aware of that you were scheduled to work the third shift for that long a period of time?

[p. 489]

A I don't understand your question.

Q Well, instead of rotating to different shifts, it appears to me that during the period of time that I indicated, particularly 10/1 to 11/28, you were working continuously the same shift.

A You mean swings?

Q No, the third shift as I understand.

A Okay.

Q And my question, don't you normally rotate shifts there at Yermo?

A Yes.

Q Can you tell me why there wasn't more rotation during that month as far as your schedule was concerned

A No.

Q Now if you'll notice over on 11/2, from the 23rd to the end of the month you were again scheduled on the third shift, were you not?

A Yes.

Q And then if you'll turn the page to 12/2 to 12/31. It appears to me that from the 2nd through the 6th you were again scheduled to work the third shift; is that true?

A Yes.

Q And then that same month from the 24th through the 31st you were again scheduled to work the third [p. 490] shift; is that true?

A Yes.

Q My only question, it looks to me like during the majority of that period of time that you were working the third shift without rotating, and I'm wondering if there's an explanation for that. Do you know why that was?

A Not offhand right now.

Q Well, let me have you look at 1/1/83 to 1/31/83. And it appears to me that starting with the 24th of that month you were scheduled to work on the third shift to the end of the month; is that the way --

A Yes.

Q -- it appears?

A Yes.

Q And then if you'll turn the page to 2/1, it appears to me that during at least half of the month you were again scheduled to work the third shift continuously, is that true?

A Yes.

Q Now do you know why it is that you continued to work the same shift without rotating?

* * * *

[p.491]

THE COURT: Maybe you don't understand the question. Do you understand what he's asking you?

THE WITNESS: He's asking me why was I working swings, 4:00 to midnights, more times than, I guess, than the day shift or graveyard.

THE COURT: He said it's his understanding that employees were kind of rotated, they worked shifts --

[p. 492]

THE WITNESS: There are no set days of rotation. We're not -- you know, we're not required to work five days of swings or five days of graveyards or five days -- you know, it can change. I could work nine days of swings or I can work nine days of graveyards. There's no set patterns of how many shifts you're going to work in that month.

THE COURT: What determines how you're going to rotate or when you're going to rotate?

THE WITNESS: The schedulemaker.

THE COURT: The schedulemaker?

THE WITNESS: Yes.

* * * *

APPENDIX C

REPORTER'S TRANSCRIPT ON APPEAL
VOLUME IV OF VI pp. 863-878

Mimi Khan
Direct Examination by Mr. Boothby

* * * *

[p. 863]

Q Let's assume that this case did not involve an individual who applied for a position --

A Okay.

Q -- and was discoverd [sic] that because of his religious beliefs he couldn't work. Let's assume, for instance, Mr. Boateng had been employed there for ten years.

A Okay.

Q And he became converted to the Adventist faith, Jewish belief, or became converted to Islam or some other religion and couldn't work on a certain day. Are you saying that then that would require him to be terminated, is that what would happen?

A No. Again, as we discussed earlier, let's say that he had been employed for ten years and then took on whatever religious faith and those requirements did not allow him to be able to work out his schedule within the [p. 864] plant quarantine inspector series. He could compete for other examinations within the department

A plant quarantine inspector is only one class out of 350 classes out of 1700 positions. There's only 100 of these positions. So he could compete for other classifications,

he could transfer into other classifications if they are within 10 percent of his salary level.

There are a variety of things that you can do for permanent employees that are on board that -- whose situation may change, whereas when you're looking at a class specification and setting up the requirements, it's something that you can't work into the concept. You can't say that it's okay to schedule people around their religious holidays or around their schools or around their -- if they don't -- if they prefer not to work on their holidays, whatever the situation is, there's no way that you can make an absolute determination along that line, and that's what the class specification is all about.

We have to be able as management to schedule people, and it is so hard to schedule, you know, between rotating schedules because you don't want the same person there at the station on an on-going basis because truckers and others get to know you and you don't have [p. 865] the objectivity and you could end up with, you know, bribes being taken and letting certain trucks go, et cetera.

So for those reasons we have to switch or rotate the schedules, and so you can't work in that this person will only be our 9:00 to 5:00, this person will never work on Saturdays, and this person will never work on Sundays. It would be very, very difficult from a management perspective to do that.

Q All right. Your response was he could perhaps take another examination, move into another position. Might it also be something that you might try to see whether by trading with other employees it worked out? Wouldn't that be a possibility?

A That has been done, yes.

Q It has been done?

A Yes.

Q When was that done?

A Oh, I believe there was one employee, and I don't know the details on it, but who after working there for a while was able -- I don't know if he was a Seventh Day Adventist, I'm not sure, but because of his religious beliefs in that station they were able to temporarily accommodate him before he retired. He'd been there for many years. I don't know the details, [p. 866] but I know that there was one situation, and that situation was brought to my attention by Howard Ingham, the individual you've discussed. But given again, a one-time, individual situation versus, you know, changing the requirements and having to do that on an on-going basis for everyone would make it very impossible.

Q You say it would make it impossible, but it at least it works on a temporary basis?

A Yes, and there are two different things here. On a temporary basis there's a lot more flexibility than on a permanent, on-going basis.

* * * *

[p. 873]

Q All right. Let me ask it in another fashion. You indicated, as I understand your testimony, that if an individual came in in - good faith hoping to have a position - there was a possibility for a transfer to another position -- and in fact you gave me a concrete illustration of a person who had

been there for ten years and became a member of a certain faith, he could transfer; is that true?

A Yes.

Q All right. You also indicated that there could be a window of time to see whether he could continue to stay; is that true?

A Um-hmm.

Q Is that true?

A Yes.

Q All right. Now assuming that Mr. Boateng came there in good faith wanting to be an inspector and it was discovered during the first three months that it just didn't work out, and it not only didn't work out in Yermo but it wouldn't work out anywhere else after investigation, was there a mechanism by which he could [p. 874] look at another place to transfer to?

A Mr. Boateng could compete for any of the examinations that were being given by the department. Part of the problem that you have with the civil service system is if -- and the plant quarantine inspector exam is a good example of this -- we test very frequently, as you would think, because of the hours. Nobody wants to work the hours and have a rotating shift. So being able to score and get on a list for the plant quarantine inspector is a lot easier than if you were to compete for an agricultural biologist position.

Q Well, but, I mean --

A So if -- so for him to not have had eligibility and to come in and say "well, I applied for this but because of my religious beliefs I don't want to take this job, I want that

job over there" is unreasonable from my perspective because he has not had an opportunity to compete with all those other individuals. Those individuals have been to an examination, are on the list, and he needs to compete there, which he would have an opportunity to do.

Q Let me come back to the man who had been there for ten years.

A Okay.

Q He would still have to take an examination for [p. 875] whatever position.

A Yes.

Q -- isn't that true?

A Yes, unless it's within 10 percent of -- there is a clause that says you can transfer to a position that's within 10 percent of your salary and responsibility level if you have permanent status.

Q How long do you have to have permanent status before you can do that?

A Permanent status is after you've finished your probationary period.

Q So if he had completed one year, he could have moved on without taking an examination?

A If the class is within 10 percent and the same responsibility level. He couldn't take a supervisor job within 10 percent of his series, but he could go to another class if the supervisor in the other unit who does the interviews and selection secretary selected him.

Q Can you give me illustration of one that would be within 10 percent of the position of quarantine inspector?

A I believe the agricultural biologist is. We have had plant quarantine inspectors transfer into that classification, and as I mentioned before, the plant [p. 876] quarantine inspector isn't the popular job to have to stay in for a long duration, so we have a lot of competition as far as inspectors wanting to go into the biologist field.

Q How about grain and commodity inspector?

A Grain and commodity inspector is either at the same level or -- I think it's below. It may be below a plant quarantine inspector, but I -- I can't remember all the salaries off the top.

Q So once the person has been there for a year, they can transfer to that?

A Yes.

Q Is that a 9:00 to 5:00?

A I believe so.

Q So if Mr. Boateng -- he could have transferred to another position within the Department of Agriculture, perhaps one of these positions that we've talked about, without taking an examination?

A If he was selected, yes.

* * * *

[p. 877]

Q Now seasonals

A Yes.

Q -- you said there's not much problem, right?

A Yes, that's true.

Q Could Mr. Boateng have been at least given a [p. 878] position -- instead of not given any position at all, could he have been given a position as a seasonal for nine months?

A That's possible, but again, I don't know if they had any vacancies, what the schedule of that seasonal employee would have been, and so on, so I can't say.

Q Well, if there had been vacancies --

A Let me tell you -- put it from this perspective, a seasonal does not have to compete in an examination, and so if there are vacancies there's -- it's much easy easier to accommodate.

* * * *

APPENDIX D

REPORTER'S TRANSCRIPT ON APPEAL VOLUME V OF VI pp. 1048-1064; 1085-1092

Howard Ingham
Cross Examination by Mr. Boothby

* * * *

[p. 1048]

Q BY MR. BOOTHBY: Now if I understood your prior testimony correctly, and let me see if I can recall your testimony, I believe you indicated that you treated, as far as scheduling purposes, your permanent employees and your seasonal employees the same; is that correct?

A Yes.

Q And you expected your seasonal employees, so [1049] long as they were employed, to be available for work seven days a week, 24 hours a day?

A Yes.

Q So there was no distinction just simply because they were seasonal employees; is that correct?

A They were all basically under the same policy, same work conditions.

Q Now have you ever heard the name of Renee Finney or Renee Hopgood?

A I don't recall -- I didn't recall her before, let's say, the last two, three weeks.

Q So if she was a seasonal employee, that policy would have applied to her, too; is that true?

A Oh, yes. I retired in 1986, and I don't know whether she worked after that or during my tenure.

Q I think her testimony was that she worked -- I think it was '80, '81, and '82.

THE COURT: That's correct.

MR. GETZ: That's correct.

Q BY MR. BOOTHBY: That would have been during your tenure.

A All right. Yes.

Q Do you recall receiving any kind of a telephone call either directly or through Mr. Gray about a person needing to be off on their Sabbath or from [p. 1050] sundown Friday to sundown Saturday attributing it to a seasonal employee?

A I don't recall one.

Q It would have been policy, would it not, for the border inspection manager to have called Mr. Gray in the event there was a request for a person to be off, even a seasonal, on a regular basis?

A It would have been policy that he call that, yes.

Q And would that normally have come in to Mr. Gray?

A Or whoever was the border supervisor at that time. In 1981 I'm very doubtful that Mr. Gray was the border supervisor.

Q That would have been who, then, in '81?

A It's just too much turnover of personnel.

Q All right. If you had gotten a telephone call saying that a seasonal had applied for a position as a seasonal employee but could not work from sundown Friday to

sundown Saturday, would it have been in accordance with your policy something that you would have said you could not have permitted?

A Yes.

Q So you would have turned that down?

A Yes, based on the requirement in the job [p. 1051] description.

* * * *

[p. 1053]

Q Let me ask it in this fashion. Would it be -- based upon your understanding of scheduling, would it be possible for a three-month period for a person to be scheduled on a basis where they would not be scheduled to work from sundown Friday to sundown Saturday?

A Only if the man making the schedule was not following policy.

Q Not following what policy?

A The unit or bureau policy that all employees rotate, do not show any preferences on shifts.

Q Well, you could rotate without being scheduled to work on a Friday night or Saturday, could you not?

A I believe it was explained that -- maybe not -- part of the policy was in the interest of fairness and elimination of complaints of employees that they all work approximately the same number of weekends, which a [p. 1054] weekend includes Saturday and Sunday, the same number of holidays, the same number of graveyard shifts, evening, and day shifts as possible. And a variance of maybe five or so, say five or six in a year's time, would be acceptable, but they were taken into consideration for the following year. And that's -- part

of my policy was always to have the supervisor -- the border supervisor check the work schedules to see what you're talking about didn't exist. And I would say from my viewpoint, had it been drawn to my attention, somebody was negligent in their duty -- or the man at the station was negligent in his.

Q Okay. Now you mentioned about policy requiring that everybody get the same number of graveyard shifts. Now one could schedule a person with an equal number of graveyard shifts and still permit that person to be off from sundown Friday to sundown Saturday, could they not?

A Yes.

Q All right. So that's not the problem, is it? Let talk about the holidays. One could schedule a person so that they had an equal number of holidays off and still schedule that person to be off from sundown Friday to sundown Saturday, couldn't they?

A The problem is accommodating this person [p. 1055] having that particular day or two days a week off, not the holiday part of it or the graveyard. It's the other employees saying "he is getting favoritism that I am not getting." And to avoid complaints as we had at Truckee, the assistant director at that time said "thou shalt see that this special accommodation does not occur."

Q Yes, sir, and you put your finger right on the problem. Isn't it favoritism, that is what you were concerned with, wasn't it?

A Special treatment.

Q Special treatment. That was the real problem you were concerned about when you turned it down -- when you turned down Mr. Boateng?

A Not that he was a Seventh Day Adventist.

Q No, I didn't say that; special treatment?

A Um-hmm.

Q Okay. Now the illustration that you gave, and you've given it a few minutes ago and you gave it in response to Mr. Getz's question to you, was what happened in Truckee; isn't that true?

A To me that is data in my computer that I react to subconsciously and my --

Q Now --

A -- my job was problem avoidance.

Q Problem avoidance. Truckee presented a [p. 1056] problem for you; is that what you're saying?

A The situation at Truckee.

Q And Mr. Boateng presented a potential problem for you; is that what you're saying?

A A very similar case. And at the time of Truckee, I had definite orders from administration "thou shalt not do this."

Q Thou shall not do what?

A Accommodate, give special treatment for any reason.

Q And when you say you had special orders, where did these special orders come from?

A Mr. Allen B. Lemmon, assistant director of Plant Industry, who is now deceased.

Q Now is it -- as I understand, you were in some supervisory responsibility in Sacramento when this problem in Truckee arose; is that correct?

A I was -- had the same position as Mr. Boateng -- as what his situation occurred.

Q No, let me rephrase it because I think you misubderstood my question. When the question in Truckee arose it involved a Mr. Riseden, did it not?

A Risden.

Q Risden. What was your position with the department at that time?

[p. 1057]

A Program supervisor of border stations.

Q All right. So you were in a supervisory capacity, and my understanding was if you had known that the supervisor was accommodating or permitting Mr. Risden to be off, you would not have permitted that.

A This is correct.

Q Okay. But it did go on for quite a while, didn't it?

A Oh, yes.

Q If there was all that much problem, why wouldn't you have heard about it?

A If it ain't broke, don't fix it. But it became broke when five others wanted the same treatment.

Q I think you testified this was back in the 1970's; is that correct, the problem in Truckee?

A Yes.

Q Wasn't it back much earlier than that? Wasn't it between 1961 and 1964?

A I don't believe so, not now. I may have said that in deposition.

Q What do you remember? In fact, you did say it was during the period of '61 through '64?

A Pardon?

Q Do you remember now that in your --

A You mean in deposition?

[p. 1058]

Q Yes.

A I don't recall what I said at that time. I was trying to give you factual answers as it came to me then.

Q Well, the reason I'm asking you this question, and it becomes somewhat critical because we had some testimony from Mr. Sandridge, I believe it was, let me see -- yes, Mr. Sandridge, who indicated that he was in Truckee during the period of time from 1959 to 1963 and Mr. Risden was getting time off then by swapping with other employees. Are you saying that this went on from whatever time that was, sometime between '59 and '63 up until the Seventies without anybody having a problem?

A We're talking about two different situations.

Q Okay.

A An employee was allowed to voluntarily trade with his immediate supervisor's knowledge, and the other one you're saying it was the supervision's responsibility to provide Mr. Boateng his 24-hour period each and every week. There's a great difference between the employee soliciting it and if he couldn't find a trade, work his shift.

Q Well, but my understanding of your testimony earlier today was that if you found out people were going to trade on an on-going basis you wouldn't permit [p.

1059] that, and apparently this was done for ten years according to your testimony just now. It's okay if it's by voluntary trade; is that your testimony now?

A It didn't have my official approval.

Q Well, it may not have had your approval, but my question is it's okay as long as it's done voluntarily; is that what your testimony is today?

A No, no, I'm just saying there's a difference between an employee asking a fellow employee to voluntarily trade or insisting that management do the trading involuntarily with other employees.

Q Okay. And --

A And the willingness of the employee to work if a fellow employee refused or didn't care to trade.

Q All right. What is the difference?

A What's the difference?

Q Yes, sir.

A The shift was covered.

Q It would be covered in both situations, would it not?

A With the exception that you're disaccommodating whoever you mandatorily require trading with him.

Q We're getting back now to the issue of fairness?

A Right.

[p. 1060]

Q All right. But as long as people are willing to do it, then even though you still wouldn't have permitted it, it's different; is that what you're saying?

A It was being done at a level that I was unaware of.

Q Well, if --

A And I did not approve of on-going trading --

Q Why was that?

A -- indefinitely.

Q Why was that?

THE COURT: By on-going, you mean indefinitely, long-term --

THE WITNESS: Yeah.

THE COURT: -- rather than one or two days?

THE WITNESS: With one or two days, but every week trading or trading whenever he did not have -- was scheduled that time off.

Q BY MR. BOOTHBY: Well, why would you have been opposed to it if was for religious reasons? Apparently it didn't create any problem for ten years.

A My lack of knowledge.

Q I understand that you wouldn't permit it. Now I'm getting down -- I'm trying to find out what the -- what would have mattered, assuming that you didn't care, [p. 1061] how would it have impacted on the public business.

A The impact comes only when the others at the station create a problem, and I am the one that operated with problem avoidance in mind.

Q Yes, sir. Except we do have a problem today, don't we?

A Yes.

Q All right. Now the problem in Truckee is a different problem than we have with Mr. Boateng; isn't that true?

A I don't see it as a different one.

Q Well, the problem in Truckee, as I understand your testimony, is that Mr. Risden wanted to be off on Sunday morning so that he could go and take care of his lay ministerial responsibilities at church on Sunday morning, and at some point in time there were some Catholic ladies that said "look, I want to go to church on Sunday morning," and all of a sudden it became a hardship when six people wanted to be off at the same time for religious reasons; isn't that what happened there?

A That's exactly it, only it was men, not ladies.

Q All right. Whatever. But the problem was that there was a hardship because a lot of people wanted [p. 1062] off at the same time. It was all for the same reasons, for religious reasons; that's what happened in Truckee?

A The reasons had no bearing. It was just six people wanting time off for any reason at the same time.

Q Whatever, but that's what caused the hardship, right?

Q Yes.

Q All right.

A Made an inability to cover Sunday morning shifts at Truckee.

Q Did you have any other individual at the Yermo station that you were aware of that was seeking to be off on a regular basis from sundown Friday to sundown Saturday?

A No, not that I was aware of.

Q So what you're really saying is that based upon what happened in Truckee you were speculating that sometime in the future there might be other people that would

want to be off at the same time, creating a problem; is that basically what you're saying?

A I'm not an expert in the field of statistics, but the theory of probability tells me yes -- or I think a more recent statement would be Murphy's law; if it can happen, it will.

Q Okay. And you were avoiding Murphy's Law?

[p. 1063]

A Attempting to avoid it.

Q Now there was testimony by a person that did the scheduling or has been doing some scheduling down at Yermo, a person by the name of -- I think her name is Lozano. Are you familiar with an employee by that name?

A I met her in the hall here the other day, and I had met her previously but basically did not know the lady.

Q All right. Now she gave some testimony that as I understood, and I think was supplemented by other testimony, that an individual can get off for certain reasons if they put their request in like by the 29th of the month prior to the 15th when the schedule is completed for the following month; do you follow me?

A Yes, I follow you.

Q Is that basically what the policy was back in 1982?

A Yes. I don't recall that it had to be in writing, but when the man made up the schedule if you were having a family reunion, a birthday, whatever, a one-time occurrence, this -- if possible, without disrupting the whole work schedule -- would take place.

Q So that was in place, you could --

A That was available to all employees.

Q So people could get off not only by trades in [p. 1064] 1982, but they could also get off by a special request made to the supervisor if it was in by a certain time?

A On a one-time, individual basis.

Q One-time basis. Now she testified that she has done that for people who were going to school. She attempted to schedule them off if she got the request in. Now you're saying that's contrary to policy?

A I don't know what her policy is after I retired. I'm not aware of her doing that when I was tenure.

* * * *

[p. 1085]

Q Would you look at Exhibit No. 25. If you'll notice, Exhibit 25 starts off with some monthly schedules from Topaz, and then if you'll turn a few pages it starts with the Meyers station.

A I'm at Meyers.

Q All right. And I think the first month that's indicated in here is one that starts 6/1 to 6/30; do you see that?

A Yes.

Q Do you see Mr. Krause, K-r-a-u-s-e?

A Yes.

Q You'll notice at the end of the month starting with the 27th he is given shift one; do you see that?

A Yes.

Q And shift, one according to the upper left-hand corner, would be 11:00 p.m. to 7:00 a.m.; is that correct?

A That's correct.

Q Is that what you would call a graveyard shift?

A Yes.

Q You notice that he works four days in June the graveyard shift; do you notice that?

A All right.

Q Would you turn over to the next page, 7/1/83 to 8/1/83. You notice that Mr. Krause starts off on the [p. 1086] first of that month working the graveyard shift and works until the 4th, and he works four days on the second shift. He's apparently off -- is that what that indicates, he was off from the 9th through the 14th?

A Are you on a different 7/1 than I am? We're still with Mr. Harms?

Q No, I'm talking about Mr. Krause.

A Excuse me, Krause. All right. Yes, I follow you now. Rephrase, please.

Q Yes. He again is working the first shift or the graveyard shift in Meyers starting with the 1st of July and works until the 4th of July on the graveyard shift?

A Yes.

Q Then he goes to the second shift, 7:00 a.m. to 3:00 p.m., for four days?

A Yes.

Q Then he's off from the 9th to the 14th?

A Yes.

Q He's back on the graveyard shift on the 17th; is that correct?

A Yes.

Q And he worked the graveyard shift until the 27th; is that what it shows?

A It's what it shows.

* * * *

[p. 1088]

Q Let me have you look at another one here, if you would, Mr. Frank. You notice Mr. Frank on the July schedule?

A I'm there.

Q He seems to work the third shift, 3:00 p.m. to 11:00 p.m., the whole month of July; do you see that?

A Yes.

Q That wasn't consistent with your policy, was it?

A No.

Q You notice here R.A. Jone, J-o-n-e, during most of that month he worked the second shift, didn't he?

A July, he did, yes.

Q So all the stations didn't really rotate on a monthly basis? I mean, within the month they didn't always rotate all their employees, did they?

THE COURT: I'm sorry, that exhibit number again was what?

MR. BOOTHBY: 26, your Honor.

THE COURT: 26.

Q BY MR. BOOTHBY: All of the employees within each border station didn't rotate every month, did they?

A This is very obvious, and you also asked -- or I told you that Mr. Mitchell had problems at this time, [p. 1089] and my recollection is coming that this was one of the reasons.

Q Okay. What problems, other than Mr. Miller having problems? I assume that's because he didn't follow your orders; is that --

A Follow the instructions.

Q Follow your instructions?

A Not mine, the instructions from the operating guide at that time.

Q Well, I thought we covered that before the break that there wasn't anything in the operating instructions concerning rotating within a month.

A There are not in those that you showed me. These were revised 1990.

Q Let me ask you about -- not about Mr. Miller, but when they weren't rotating there at that station, Meyers, what problem arose there other than the fact that you had problems with Mr. Miller?

A The U.S. Highway 50 is not a commercial truck road, and I have to honestly say -- I could not say there would be a high probability of any collusion among employees and truckdrivers.

Q Did you ever give any consideration to moving Mr. Boateng to a station like the Meyers station where maybe there wasn't as much of a need to do the type of [p. 1090] rotation that you indicated was necessary?

A Because this went on doesn't mean that I felt that way about it.

Q I know how you might have felt because you had those directives, but I'm talking about a practical solution to a problem. If there wasn't a real problem with collusion, did you give any consideration to moving Mr. Boateng there where it might be a bit easier to work?

A When you run an organization, especially a law enforcement-type agency, lack of uniformity is the first premise for problem.

* * * *

Q I want to ask you a little bit about the traffic situation. You indicated the traffic was heaviest on the weekends, and I think you said Saturday and Sunday; is that correct?

A In most cases, yes, and holidays.

Q When you say "most cases," what do you mean by that?

A There's always exceptions to the rule. [p. 1091] Airplane show at the field there, and Reno attracts thousands of people, and if that happens during the week, that generated the traffic. Or the same thing could be true in Las Vegas or Phoenix, Arizona.

Q Isn't it true that there are some stations where there really isn't any increase on the weekend as compared to the rest of the week?

A I would say no, when you say "any increase,"

Q All right.

A Maybe relatively insignificant compared to the major, but I can't honestly say there would be no increase.

Q All right. But the increase would not be a substantial factor; could we say it that way?

A Very possible, yes.

Q All right. Well, in looking at a means to accommodate Mr. Boateng, wouldn't you want to look at a station where not only -- where you don't have the problem of

commercial traffic, but perhaps looking at a station where there isn't this major increase on the weekends?

A It reduces the number of employees that the man has available to trade, it increases the possibility of those that are available of being either on vacation, sick or not wanting to trade for family reasons.

[p. 1092]

Q Let's talk about that. Now there has been testimony about polling the people at Yermo. Did you ever think about polling anybody at maybe Meyers, where they already accommodated somebody? Did you ever think about polling those people?

A No, I didn't have the problem at Meyers.

Q But if you moved Mr. Boateng to another place where it might be easier to accommodate, then you might want to know what those employees thought about trading with Mr. Boateng; wouldn't that be an important question?

A In retrospect, I agree with you. At the time I was overworked, I was opening up the stations, had capital outlay problems, we were hiring 60-some people, spreading our permanent inspectors out as thin as we could to train the new people. I could kind of look back and say "hey, Howard I'm -- I marvel that you took this amount time." But I did feel it was important, so you could yes, say what you're saying, why didn't I.

* * * *

APPENDIX E

REPORTER'S TRANSCRIPT ON APPEAL

VOLUME V OF VI pp. 1135-1147, 1168-1176

Martina Haleamau
Direct Examination by Mr. Getz

[p. 1135]

* * * *

Q It mentions -- and I'm looking at Exhibit M, the first chart -- it mentions M-1's period is 5/1 through 5/31, Yermo. Can you explain what that is, what that references to?

[p. 1136]

A That is for the month of May, May 1st to May 31st.

* * * *

Q So all three of these refer to the same period of time and the same border stations?

A Yes.

* * * *

[p. 1140]

Q Now this schedule was -- this, you say, is 5/1 to 5/31; what year was that?

A We based the schedule on 1982.

Q So if one were to look at the 1982 schedule for Yermo, you would expect to see that schedule in existence with the exception that there would be names [p. 1141] under plant quarantine inspector, station supervisor, et cetera?

A Yes.

THE COURT: I'm sorry, this Exhibit M, as well as N and O, are intended to speak as of 1982?

MR. GETZ: That's correct.

THE COURT: And the date that -- the witness said she believed the charts were made in 1985. So does that mean that she went back and made them in 1985 but used data from 1982?

MR. GETZ: Absolutely correct, your Honor. That's the next area, in fact. I'll refer the Court and witness, if you look in your book to Exhibit 24.

THE COURT: I thought you anticipated an objection from Mr. Boothby on the grounds that you were using data that existed for 1985 and '86 when we were dealing with 1982.

MR. GETZ: I misspoke. What I meant to say was that this examination was performed -- or inspection or whatever you want to call it -- was performed by Ms. Haleamau in 1985 or '86 and not 1982.

THE COURT: So there might be an objection.

MR. BOOTHBY: Well, I'm just -- I'm really confused. Now if I can -- I don't want to interrupt anything, but I'm looking at 24. Exhibit No. 24, 5/1 to [p. 1142] 5/31/82, and it seems to me that this does not match the chart. I'm confused.

For instance, down at the bottom it shows on my chart, numbers on duty on the 1st, nine, and five off. That shows ten on and five off. The next one shows nine on and five off, and there it shows -- I'm having problems, your Honor.

THE WITNESS: Yes, you're right. According to what is in this book, it's different from what is shown on the chart there. When we made this, I had taken the 19 -- the 5/31. 1982 schedule and basically kept it the same. Now you have to excuse me because this is what, seven or eight years ago that

we did this, and some of the little details now are forgotten. But we tried to keep it exactly the same. In some instances we took the liberty to change -- for example, some of the vacation days, we took the liberty to change it. We tried to show that there were -- I tried to show that there were as many people working as possible.

MR. BOOTHBY: But you didn't, though, did you? Weren't there 16 people listed on here?

THE WITNESS: One is a seasonal. We're not showing the seasonal there.

MR. BOOTHBY: Why not, if it was for May?

THE WITNESS: We were talking about permanent [p. 1143] employees and not seasonal employees.

* * * *

[p. 1144]

THE COURT: I let you break in and ask some questions so you understood what she's doing, but you can't go back and forth. Now I want to find out what this is about, and then the whole thing may go out if you believe that it should and if I agree with you. [p. 1145] It's just that simple. But I don't understand it yet.

Now I want Mr. Getz to develop, if you will please, so that I understand why there are changes made on Exhibits M, N, and O from what the original counterparts were that were made out at the time and, if so, why changes were made.

MR. GETZ: That's exactly what I was going to bring out, you Honor. I appreciate that.

Q Ms. Haleamau, the chart that you prepared was for purposes of illustrating certain issues; is that correct?

A Yes.

Q Now it was based on information from Yermo in 1982?

A Yes.

Q You've already testified there were certain changes you made. Could you explain why those changes were made?

A Yes.

Q Okay. Would you please?

A Oh, explain why the changes were made, yes.

THE COURT: First of all, what the changes are and why they were made.

THE WITNESS: Okay. In doing those illustrations we want to show that all the inspectors [p. 1146] were working. I also want to show that we were trying to equalize -- always equalize the numbers of day shift, swing shift, and graveyard shifts would be approximately the same for everyone. I was also trying to demonstrate that every employee was able to have at least four days off in a row once during the month.

THE COURT: Now I'm lost. I assumed that exhibit -- I'm just working with M; that's enough right now. Exhibit M purports to show what actually happened in 1982; apparently that isn't true.

MR. GETZ: No, I don't think it was represented as that. I think what was represented, it was based on information from 1982. There's a distinction. The distinction is for purposes of illustrating what happens when a person has to be accommodated. What Ms. Haleamau did with this exhibit was base it on actual 1982 information to make it, you know, not entirely hypothetical.

THE COURT: What do you mean "base it on 1982 information"?

MR. GETZ: Meaning, you Honor, that she picked the May 1982 Yermo schedule as the model, but she did not -- for purposes of illustration she did not follow each and every entry in the May 1982.

THE COURT: But then what's the purpose of the [p. 1147] exhibit if it doesn't follow what happened?

MR. GETZ: Your Honor, the purpose of the exhibit is to show as a matter of scheduling these are the goals of the department.

* * * *

Cross Examination by Mr. Boothby

[p. 1168]

Q 24, I'm sorry. Do you find Exhibit 24?

A Do you want me to look at it from 1982?

Q Well, let's just start with the very first month, January.

A Okay.

Q Okay. Now does that show you that you always have more people on on the weekend in January of 1982?

A You're going to have to give me a little time. I haven't seen these in a long time.

Q Sure. While you're doing that, would you look at -- let's take the first six months, and look at those.

A Now what I'm doing is looking at Saturdays and Sundays?

Q Would you compare those with the other days?

A Pardon me?

Q You're going to have to compare that with the other days.

[p. 1169]

A Yes, but the focus is on Saturday. Okay.

Q Does it look to you like Yermo during -- what did you look at, the first six months.

A Yes.

Q Did it look like they had more people assigned to work on Saturday and Sunday as they did the rest of the week?

A In some cases yes, and some cases no.

Q In fact, in some cases there were less people during the weekend; isn't that true?

A On one of the other schedules, yes.

Q At least -- at Yermo, at least during that period of time, it didn't follow your pattern, did it?

A Not on these schedules.

Q Did you look -- Didn't you look at the 1982 kind of as a pattern?

A I looked back at 1982 as a reference point, but --

Q Did -- I'm sorry. Did it make any difference -- would make any difference in what you did if you didn't try to have more people on the weekends? Would it have any impact at all on what you came up with?

A Can you rephrase that, please?

Q Yes. If you didn't try to have more people on [p. 1170] the weekends, on Saturday and Sunday, would that have any impact on what you were doing there on your hypothetical chart?

A It still would have an impact.

Q Well, I assume it would, but would it change what you came up with?

A It may.

Q All right. Now you did assume, did you not, that Saturday and Sunday are the heavier days?

A Yes.

* * * *

[p. 1171]

Q Exhibit 26. It has Topaz and Meyers.

MR. GETZ: Excuse me, your Honor, I think that's Exhibit 25.

MR. BOOTHBY: I'm sorry, that's true.

THE WITNESS: Okay.

Q BY MR. BOOTHBY: Now this has a completely different kind of setup as far as numbers of inspectors and supervisory people, does it not?

A Yes.

Q Did you at any point in time attempt to determine what the impact would be accommodating an individual on a regular basis in a place like -- let's take Topaz to start with.

A No.

[p. 1172]

Q Now if you'll look with me, there's a schedule on Meyers also. Do you notice that?

A For June?

Q Yes, starting with June. Do you notice that?

A Yes.

Q And that has a few -- at least one more permanent person working at that station; is that correct, than in Topaz?

A Yes.

Q So the impact might be different there; is that true?

A Pardon?

Q The impact might be different there at that station?

A Yes.

Q All right. Now I want to have you look in the upper left-hand corner. You'll notice that there are shift numbers?

A Yes.

Q Now they have a graveyard shift that is different than at Yermo. It starts at 111:00 p.m. and ends 7:00 a.m.; is that true?

A Yes.

Q Now Mr. Boateng, if he had been at the Meyers station, he could have worked on graveyard shift on [p.1173] Saturday, could he not? He could have worked from 11:00 p.m. Saturday night to 7:00 a.m. Sunday morning; is that true?

A I don't know. I don't know when sundown is.

Q Well, Saturday night when his Sabbath stopped, could he not, at Meyers?

A Yes.

Q And he could have worked at least second shift on Friday, could he not, 7:00 a.m. to 300 p.m.? 3:00 p.m. would be before sunset, would it not?

A Yes.

Q He could work every other day of the week, could he not?

A Yes.

Q So he wouldn't have to be off -- you wouldn't have to schedule him off weekend, would he?

A But Meyers was not a consideration.

Q Why not?

A He didn't request for Meyers. I mean, Yermo was the station.

Q Yermo was the station because of what?

A That's where he --

Q That's where he was assigned?

A I'm not sure at that time if there was a vacancy at Meyers.

[p. 1174]

Q Well, do you know if anybody looked to see if there were any other stations he could have gone to?

A I was not in the program at that time.

Q So you don't know the answer?

A No, I don't.

Q So the only thing you looked at was Yermo?

A For these charts, yes.

Q Well, did you look at anything other than Yermo for any reason other than the chart for Mr. Boateng?

A I was not in the program at that --

Q So the answer is --

A -- time.

Q The only thing you did is look at the chart on the basis of Yermo and that's all this was done for?

A An illustration that I was involved in, yes.

Q Now going back to your chart then, what if Mr. Boateng said "I'd be willing to work the graveyard shift starting at 12:00 midnight on a Sunday morning to 8:00 a.m., and I'll be willing to work the short shift; I'll take the eight hours off." That's permissible, isn't it? You can have an eight-hour time span when the man's off and have him back again, can you not?

A Yeah.

Q What if he said "I'll do that as often as it's [p. 1175] necessary"? Would that have any kind of an impact if he would have worked so that he'd work two shifts on Sunday? Would that have any effect on your charting the thing out?

A Scheduling of one employee impacts other employees.

Q The question is, would it have had a lesser impact had he been willing to do that?

A If you're talking about for --

Q And I didn't say every Sunday, I said whenever necessary.

A If your talking about doing that you cannot answer that question without really looking at it and figuring it out.

Q So you don't know the answer to this question?

A Not off-hand, no.

Q What if Mr. Boateng was willing to trade with a person who was scheduled to work on Sunday? Did you consider trading?

A Not for this, no.

Q All right. And that would make it easier , would it not, if the people did it by trade?

A Of course.

* * * *

APPENDIX F

REPORTER'S TRANSCRIPT ON APPEAL

VOLUME VI OF VI pp. 1191-1200

Martina Haleamau
Continued Cross Examination by Mr. Boothby

[p. 1191]

BY MR. BOOTHBY: Okay. Would you turn to [p. 1192] Exhibit No. 24 and look at the May 1/May31 schedule.

A For 1982?

Q For 1982.

A Is this the schedule that you want me to look at?

Q Yes. Now I have a problem because my May 1, 1982 schedule seems to start with May 1 a Saturday. Did you use a 1982 calendar when you did this?

A I also noticed that, too

Q Okay.

A And I must say that this was done a long time ago. Some of the facts, I don't recall them all.

Q And in fact in May of 1992, there were actually ten Saturdays and Sundays in the pay period, were there not, instead of nine?

A In 1982?

Q Right.

A That's -- yes, that's true.

* * * *

[p. 1194]

Q Now I'd like to have you, also looking on the May 1 schedule, tell me if --

[p. 1195]

THE COURT: That's Exhibit 24?

MR BOOTHBY: Exhibit 24.

Q Can you tell me if everyone there got a four-day weekend off?

A Do you want it limited to the inspectors?

Q Yes. I assume that's what you're limiting to, are you not?

A I'll need a few minutes.

Q Well, let me have you look at the third from the bottom, number 14.

A Berder?

Q Yes.

A Okay.

Q Now he didn't get a four day weekend off, did he?

A He got four days off in a row.

Q Well, no, but you said four-day weekend; isn't that what you were striving for?

A That's what we strive for, but if you notice here sometimes you don't have a four-day weekend off in a row.

Q All right. But you had actually -- on this calendar you actually had more Saturdays and Sundays than you did on

yours. You should have had an easier time having Sundays and Sundays off four days in a row, [p. 1196] shouldn't you?

A But, sir, again, according to the schedule -- and again if you look at May 1982 you had two supervisors on vacation at the beginning of the month, and you had --

Q How about --

A -- you had someone on vacation at the latter part of the month, and so it's considering availability.

Q How about Lozano?

A Maria Lozano?

Q Did she have a four-day weekend off?

A Maria Lozano, on the first Saturday/Sunday she had a day off, the 1st and 2nd.

Q Was it a four-day weekend?

A You can consider it a four-day weekend off because after that, after Saturday/Sunday she has Tuesday/Wednesday off.

Q Let me ask you this, have you gone through all of the calendars of Exhibit 24? And I suggest to you that every one of them has somebody who didn't get a four-day weekend off. How would that be justified in light of the fact that you testified that this is what's done basically at all the stations?

MR. GETZ: Objection; it mischaracterizes the testimony. I think she testified the ideal is to try to [p. 1197] give everybody a four-day weekend, not that it was absolutely done.

THE COURT: Well, she can answer the question. Will you restate it, please?

MR. BOOTHBY: Sure.

Q My understanding is your testimony is that what you did on this chart is what you knew was done at all the stations, including Yermo, and I'm suggesting to you, and I can take -- if I could take the time, I would do it -- I would suggest to you that on every month somebody doesn't get a full weekend off, and on every month there are several people that get more than a full weekend off plus two extra days. In other words, there are people getting four-day weekends, other people are not getting four-day weekends, and some people are consistently in that pattern. And my question is why is that?

A We strive to always give everybody a four-day weekend off. Now you're talking about 1982, okay, and we strive to give everybody at least four or five days off in a row. Weekends are preferable if you can do it. If a person did not get it for that month, then definitely the following would strive to have that person have a day off -- have a weekend off. And to do that, you have to look at the month above and the month [p. 1198] after. You have three months that you're looking at at one time.

Q So really you cannot judge it with a one-month calendar, can you?

THE COURT: Judge what?

MR. BOOTHBY: Judge what is fair, what is appropriate and what is normal.

Q You have to look at more than one month , don't you?

A Yes, when you're making a schedule.

Q Let me have you look at, for instance, March of '83.

A '83?

Q March of '83.

THE COURT: That's part of Exhibit 24?

MR. BOOTHBY: Exhibit 24, yes.

THE WITNESS: Okay.

Q BY MR. BOOTHBY: Now does -- let's look at Mr. Tracy. Did he get a four-day weekend off?

A He got a Friday/Saturday off. Now do you want me -- he got four days in a row twice.

Q Yeah, but did he get a four-day weekend off?

A He got a Saturday off with that.

Q Now on your chart you made sure that everybody had a Saturday and Sunday off, did you not?

[p. 1199]

A We also spoke about ideal on that chart.

Q I understand. But my question is, did Mr. Tracy get a four-day weekend off including Saturday and Sunday?

A Not in March 1983.

Q How about Mr. McClane?

A No, he did not, but --

Q How --

A -- however, I think it qualifies a further response. I didn't know the situation of these two employees then. I didn't know if they had requested to have these specific

days off, so it's very difficult for me to say -- answer that question, truly, not knowing the situation.

Q How about Mr. McCormick?

A No, he did not.

Q How about the next one, R.L. Daniels?

A No, he did not.

Q Let's look at the next month, and you said "well, you got to look at more than one." Look at Mr. Tracy again; did he get a four-day weekend off?

A What you don't know is that at the end of the month --

Q Yes.

A -- he is off. You don't know if the following [p. 1200] month --

Q Well, let's look at the following month. It's the next page.

A No, he didn't.

Q Well, he didn't get it off two months in a row. How do you explain that?

A Sir, like I said, I cannot explain it not knowing the situation, not knowing what was happening with these employees. I don't know if they requested those specific days off.

Q Oh, and if they request days off it makes a difference?

A Yes, if you request a specific time off.

Q How about Mr. Daniels in April; did he get it off?

A According to this, no.

* * * *

APPENDIX G

DEFENDANT'S STATE OF CALIFORNIA POST-TRIAL BRIEF at p. 48

* * * *

At no time has defendant suggested that the "morale" of the Yermo station would inevitably suffer if plaintiff were accommodated.

* * * *

APPENDIX H

DEFENDANT'S STATE OF CALIFORNIA BRIEF IN THE NINTH CIRCUIT COURT OF APPEALS at p. 20, n. 18

At least one witness, Maria Lozano, testified that she also was able to swap shifts on occasion to attend religious services and meetings. (RT 433). Further, as plaintiff admits, for 10 years, a Catholic lay minister was accommodated for religious reasons until problems arose. (RT 1057-1059; 951-95). Thus, the claim that all shift swaps were for "secular reasons" is not substantiated by the record.